Office of the Chairman
Administrative Conference of the United States

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Recommendations and Reports

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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RECOMMENDATIONS

Recommendation 90-1

Civil Money Penalties for Federal Aviation Violations

In late 1987, Congress enacted an administrative civil money penalty program for violations of the Federal Aviation Act and its implementing safety regulations. The Civil Penalty Assessment Demonstration Program, a 2-year temporary program, was originally due to expire December 31, 1989. It was extended for 4 months in anticipation of the completion of a study of the program undertaken by the Administrative Conference of the United States at the request of the Department of Transportation. Congress extended the program an additional ninety days, after receiving a draft of this recommendation from the Conference's Committee on Adjudication.

The demonstration program currently authorizes administratively-imposed civil money penalties of amounts of up to $50,000. The cases are initiated by the Federal Aviation Administration (FAA), an agency within the Department of Transportation (DOT). The cases are heard by DOT administrative law judges (ALJs), with appeal to the FAA Administrator. Judicial review is available in the federal courts of appeals.

The FAA has substantive regulatory authority under the Federal Aviation Act. It promulgates regulations to promote aviation safety, conducts investigations to ensure compliance, and brings enforcement actions. It also has responsibility for issuing certificates for most aviation businesses and functions.

The civil money penalty program supplements previously available sanctions, which include judicially-imposed civil money penalties and FAA administrative actions to suspend or revoke certificates. FAA certificate actions, if appealed, are adjudicated by the National Transportation Safety Board (NTSB). The NTSB is an independent agency that has as its primary responsibilities investigating accidents and issuing air safety recommendations, in addition to adjudicating certificate cases.

The civil money penalty program has been in operation since September 1988, when the FAA promulgated its procedural regulations as final rules with opportunity for subsequent comment. In March 1989, the FAA addressed the comments received, but made no changes in the regulations. The FAA recently announced revisions in its policy on some issues relating to its rules of practice for the civil penalty program, and in April 1990, the FAA published a notice of proposed rulemaking on its civil penalty program rules of practice.[1] These proposed rules substantially incorporate the recommendations presented below in paragraph 4.

The Administrative Conference believes that administrative assessment of aviation civil money penalties should be made permanent, but that the changes presented below would improve the program's operation and enhance perceptions of fairness.

The Conference has long advocated the administrative imposition of civil money penalties as an alternative to reliance on judicial enforcement.[2] Administratively-imposed sanctions are generally faster, less expensive, and more effective in enforcing regulatory schemes than is reliance on judicial enforcement, and the FAA experience appears consistent with this view. Therefore, the Conference recommends that administrative assessment of civil money penalties be made a permanent feature of federal regulation of aviation safety.

Administrative imposition of civil money penalties for violations of safety regulations is at present limited by statute to penalties not in excess of $50,000. The Conference notes that many agencies do in fact--and without untoward consequences--exercise power to impose far heavier monetary penalties than those now authorized in the civil aviation area. The Conference recognizes that the severity of possible sanctions for violations of law is a matter for Congressional choice, but the Conference believes that, in this instance, expanding the scope of money penalties following appropriate administrative hearings would enhance efficient administration without risking loss of fairness.

The Conference takes no position at this time on whether the adjudication of civil penalty actions under this program should remain a function of the DOT, or whether it should be shifted to the NTSB. There are arguments on both sides. Such a determination should respond to interests of administrative simplicity and efficiency, fairness and the appearance of fairness, and accountability for aviation safety. The NTSB currently adjudicates violations of federal aviation law in the context of certificate proceedings, so it already has experience in the substantive area, as well as established and respected adjudicatory procedures. A transfer of these proceedings to the NTSB would place almost all administrative sanctions for aviation safety violations in one forum. Moreover, the independence of the NTSB from the prosecuting agency would promote the appearance of fairness, by formally separating the agency prosecuting the case from the one adjudicating it.[3]

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[1] The FAA's rulemaking has been in two steps. In early March 1990, the FAA issued a notice of proposed rulemaking on a number of specific issues in the civil penalty procedural rules that had been particularly controversial. In mid-April, the FAA issued a final rule in this rulemaking, with a delayed effective date. At the same time the FAA put out its entire set of procedural rules, incorporating these changes, for notice and comment. 55 Fed. Reg. 15110, 15111; 15134, 15135 (April 20, 1990). At the time this recommendation was adopted, June 7, 1990, the comment period in the second proceeding had closed, but a final rule had not been issued.

[2] See Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR §305.72-6; Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3. Many statutes have since incorporated the administrative penalty system recommended by the Conference.

On the other hand, any transfer of civil penalty adjudicative responsibility to the NTSB would entail legislative consideration of whether and to what degree deference should be given by the Board to FAA policies and whether the FAA Administrator should be entitled to seek judicial review of adverse NTSB decisions. Moreover, retaining the adjudicative function in the FAA would allow for coordinated regulatory and enforcement policy in one agency, a model that is used by most federal agencies. If it is important to have hearings in both certificate and money penalty cases heard in the same forum, theoretically the former function could be transferred to the FAA. Although there has been criticism of the FAA's rules of practice, the agency is about to complete a rulemaking in which it has proposed significant changes in its rules. Finally, aviation safety and related enforcement are the chief missions of the FAA.

The better choice between the two is not self-evident. Factors that could not be adequately studied in the available time include the relative capacities of DOT and the NTSB to adjudicate cases promptly and fairly, any effect that the location of adjudicative authority might have on aviation safety, and the two agencies' respective capabilities to procure necessary resources. If Congress extends the aviation civil penalty program either permanently or for a substantial period, it is the Conference's intention to study the issue of the more appropriate location for adjudicatory authority.

As long as the adjudicatory authority is lodged in the DOT, the Conference recommends some procedural changes that would improve the program's operation. The FAA previously interpreted its statutory authority as contemplating a formal finding of a violation (order assessing civil penalty) as a prerequisite to compromising a disputed civil money penalty case. As a result, fewer cases settled than under former agency practice, and a substantial backlog developed. As part of the ongoing rulemaking proceeding, the FAA has been reconsidering its position and has concluded that the enabling law does not preclude compromising cases without a finding of a violation. In any event, Congress should make explicit that the FAA has the discretion to compromise disputed cases without a formal finding of a violation.

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[3] See Recommendation 86-4, "The Split-Enforcement Model for Agency Adjudication," 1 CFR §305.86-4.

It is important that rules of practice governing adjudication of civil money penalty cases be fair, and that they appear fair. In most cases, the regulations that the FAA previously adopted were adequate, but several provisions led to some misunderstanding and perceptions of unfairness. The rules of practice should therefore be revised to eliminate existing ambiguities, pursuant to the ongoing notice and comment rulemaking.[4]

RECOMMENDATION

1. Congress should authorize on a permanent basis the administrative imposition of civil money penalties for violations of the Federal Aviation Act (Act) and of its implementing safety regulations.

2. Congress should eliminate the current ceiling of $50,000 applicable to administratively-imposed civil money penalties for violations of the Act and its implementing safety regulations.

3. Legislation providing for continued administrative imposition of civil money penalties should make explicit that the Federal Aviation Administration (FAA) has administrative discretion to compromise disputed cases without requiring a formal finding of a violation.

4. As long as adjudicatory responsibility is lodged at the Department of Transportation, the Department should adopt revised rules of practice governing adjudication of civil money penalty cases following notice-and-comment procedures. Such rules should address the following issues:

   a. **Separation of functions:** The regulations should make clear that employees with investigatory or prosecutorial responsibilities in a case in this program will not communicate with the administrative law judge or agency decisionmaker in that case or a factually related case, except as counsel or a witness in the public proceedings.

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[4] As noted earlier, the proposed rule in the rulemaking ongoing at the time this recommendation was adopted substantially incorporates the provisions of paragraph 4 of the recommendation.

b. **Testimony of FAA employees:**

1. The regulations should permit FAA employees to testify as to facts relevant to any disputed issue. Within the scope of this rule, hearsay testimony from FAA employees should be treated the same as other hearsay testimony.

2. FAA employees testifying as experts should be subject to full cross examination.

c. **Designation of documents:** The regulations should avoid denominating the document used to commence formal civil penalty proceedings as an "order," and should use a term such as "complaint."

d. **Use of briefs:** The regulations should permit the filing of post-hearing briefs whenever, in the ALJ's view, the interests of justice so require.

e. **Explanation of basis for sanctions imposed:** The regulations should establish a uniform standard for explanation of sanctions imposed in initial decisions, regardless of whether the ALJ affirms or modifies the proposed sanction.

Recommendation 90-2

The Ombudsman in Federal Agencies

The ombudsman[1] is an institution frequently used in other countries, and increasingly used in this country, as a means of inquiring into citizen grievances about administrative acts or failures to act and, in suitable cases, to criticize or to make recommendations concerning future official conduct. Typically, an ombudsman investigates selected complaints and issues nonbinding reports, with recommendations addressing problems or future improvements deemed to be desirable. In cases involving the agencies of the government, an ombudsman may deal with complaints arising from maladministration, abusive or indifferent treatment, tardiness, unresponsiveness, and the like.[2] To succeed, an ombudsman must have influence with, and the confidence of, top levels of an agency, be independent, and be able to conduct meaningful investigations into a complaint without being thwarted by the agency staff whose work is being examined. The most successful occupants of that office have generally been persons of high rank and status with direct access to the highest level of authority.

The experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decisionmakers with the information needed to identify and treat problems. Agencies currently employing an ombudsman with success in various programs include, among others, the Internal Revenue Service and the Army Materiel Command.

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[1] "Ombudsman" is a Swedish word meaning "agent" or "representative," and its use here is not intended to discourage others from using more gender neutral terminology.

[2] An ombudsman may be appointed by the legislature or by the executive and with a variety of possible powers, missions, and available resources. While there is no universally accepted notion of what an ombudsman should do, under one approach, that of the Model Ombudsman Statute, the ombudsman could address "an administrative act that might be:

1. contrary to law or regulation;
2. unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;
3. mistaken in law or arbitrary in ascertainments of fact;
4. improper in motivation or based on irrelevant considerations;
5. unclear or inadequately explained when reasons should have been revealed;
6. inefficiently performed; or
7. otherwise objectionable. . . ."

The Comment to the Model Statute adds, "Very clearly, the ombudsman must not attempt to be a super-administrator, doing over again what specialized administrators have already done and, if he disagrees, substituting his judgment for theirs."

The Conference urges the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public. The Conference believes that these agencies would benefit from establishing an office of ombudsman either on an agency-wide basis or to assist in the administration of particular programs.

RECOMMENDATION

A. Establishment of Ombudsmen

1. Federal agencies that administer programs with major responsibilities involving significant interactions with members of the general public are likely to benefit from establishing an ombudsman service. Examples of such programs include the following: licensing; revenue collection; procurement; award and distribution of welfare, pension, or disability benefits; oversight of public lands; administration of detention facilities; public assistance programs; immigration programs; and subsidy or grant programs.

2. In cases where agencies with significant interaction with the public seek legislation to provide funds or other statutory underpinnings for an ombudsman, the legislation should conform generally to the guidelines set forth in paragraph B, below, and should be prepared in consultation with knowledgeable agency personnel and outside entities and affected members of the public or their representatives.

3. Whether or not legislation is enacted, each federal agency with major responsibilities involving significant interaction with members of the general public should consider setting up an agency-wide or program-specific ombudsman as a means of gaining experience with the concept and improving service to the public. Agencies should follow the guidelines in paragraph B in establishing an agency ombudsman.

B. Guidelines for Ombudsman Legislation and Agency Programs

1. Powers, duties.

a. Ombudsman legislation or agency guidelines should set out the functions to be performed by the ombudsman and confer the powers needed to enable the ombudsman to (i) receive and inquire into complaints, (ii) recommend solutions in individual matters and make recommendations for administrative and regulatory adjustments to deal with chronic problems and other systemic difficulties, (iii) advise within the agency concerning procedures, forms, and similar issues affecting the nature and delivery of services; and (iv) call attention to agency problems not yet adequately considered within.

b. The legislation or agency guidelines should require the ombudsman to submit periodic reports summarizing the grievances considered; investigations completed; recommendations for action, improvement in agency operations, or statutory changes; agency response; and any other matters the ombudsman believes should be brought to the attention of the agency head, Congress or the public.

c. The legislation or guidelines should also provide that the ombudsman should refrain from involvement in the merits of individual matters that are the subject of ongoing adjudication or litigation or investigations incident thereto.

2. Qualifications, term.

The legislation or guidelines should set forth the qualifications required for the position of ombudsman, the tenure of office, salary, safeguards protecting the independence and neutrality of the ombudsman, and means for ensuring access to the ombudsman. The Conference recommends that the ombudsman be a respected, senior person known for his or her judgment, probity, and persuasiveness.

3. Confidentiality.

a. The legislation or guidelines should protect communications to or from the ombudsman in connection with any investigation (other than reports intended to be made public), as well as the ombudsman's notes, memoranda and recollections, and documents provided in confidence to the ombudsman. The legislation or guidelines should provide protection against disclosure in judicial, administrative, and congressional proceedings consistent with that recommended by Administrative Conference Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality," 1 CFR §305.88-11.[3]

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[3] As a practical matter, confidentiality guarantees in pending legislation--the Administrative Dispute Resolution Act, S. 971 and H.R. 2497 (101st Congress 1st Session)--if enacted, would likely protect communications in ombudsman proceedings.

b. An agency, when establishing an ombudsman, should explicitly disclaim authority ordinarily,[4] to discover or otherwise force disclosure of an ombudsman's notes, memoranda or recollections, or of documents provided to the ombudsman in confidence.

4. Judicial review, liability.

Any such legislation should provide that (i) no inquiry, report, recommendation, or other action of the ombudsman shall be subject to examination or review in any court, unless the ombudsman is subject to criminal investigation; and (ii) no civil action shall lie against the ombudsman for any action, failure to act, or statement made in discharging the ombudsman's responsibilities.

5. Access to agency officials and records.

The ombudsman should be given direct access to the head of the agency and to high-ranking officials within it. The legislation or guidelines should authorize the ombudsman to request agency officials to provide information (in person or in writing) or records the ombudsman deems necessary for the discharge of its responsibilities; and should require, absent countervailing compelling concerns relating to confidentiality or privacy, that such information be supplied to the extent permitted by law.

6. Outreach.

An agency with an ombudsman should take effective steps to ensure that persons who deal with the agency are aware of the existence, purpose, and availability of the ombudsman service. These steps could include active campaigns to inform the public of the service.

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[4] Exceptions might include cases where there is a duty to warn of a threat to personal health or safety, criminal matters, and other compelling exigent circumstances.

Recommendation 90-3

Use of Risk Communication by Regulatory Agencies in Protecting Health, Safety and the Environment

The term "risk communication" is commonly used to describe procedures by which a public agency or other party possessing information about the hazardous attributes of an activity or product transfers this information to others. For several decades, the Freedom of Information and National Environmental Policy Acts have, in effect, provided for government risk communication by requiring federal agencies to transfer information they possess on risk (among other matters) to members of the public on their request.

More recently, Congress and federal agencies have created an additional form of risk communication, one that requires other persons or entities to produce and distribute certain information on the hazardous attributes of their activities and products to third parties. The intended recipients may include employees, product users, and the representatives and residents of communities that host certain types of activities. These recent enactments establish risk communication duties for the private sector, at times creating concomitant rights to such information for designated parties. This recommendation addresses the class of risk communication aimed at providing information to third parties.

Risk communication can be a significant feature of programs to control risks that have been identified and assessed by Congress and the regulatory agencies. Its benefits may include widespread acceptability, greater effectiveness and less demand on resources than alternative approaches.

Risk communication programs are now being implemented to foster risk education and reduction in several contexts. The Occupational Safety and Health Administration's (OSHA) "hazard communication" or "worker right-to-know" standard requires firms producing or using designated hazardous chemicals to provide workers with risk information and training on workplace hazards so that the workers will understand the hazards, determine personal risks, and take appropriate actions to reduce these risks.

The Federal Emergency Planning and Community Right-to-Know Act, administered by the Environmental Protection Agency (EPA), requires companies producing or using designated hazardous chemicals to provide state and local committees and EPA with information about the chemicals, accident risks, spills, and other actual releases of the chemicals to educate these recipients and enable them to develop emergency response plans and other strategies for protecting public health and the environment. The law expressly provides for public access to the information disclosed by industry.

Experience with the OSHA and EPA programs suggests that risk communication can advance statutory objectives for risk reduction and can, when properly implemented, reduce the costliness of risk reduction efforts. Workers and community residents now have access to relevant industrial hazard information and are beginning to use the information to take protective measures. Worker training and community emergency planning are also being gradually achieved. State and local officials are taking legislative and regulatory actions to reduce industrial risks. Efforts to achieve international harmonization are also under way. Companies and trade associations are voluntarily initiating new risk reduction practices and some chemical manufacturers are now voluntarily transferring their superior knowledge of chemical risk management to their downstream commercial customers to enhance marketing.

However, these new programs have raised special problems for agency administration and for compliance, particularly for small business. For example, the OSHA and EPA programs require that three basic functions be carried out by various parties: (i) producing the reports and other information materials to be disclosed; (ii) distributing the information to persons at risk; and (iii) using the information for developing worker training programs and community emergency response plans. In both programs, compliance with production function requirements has generally been more effective than compliance with distribution and use function requirements.

Agency programs requiring risk communication also have implications for concurrent regulatory efforts and traditional standard-setting that have not been adequately addressed by the agencies or Congress. Risk communication is not necessarily an adequate substitute for prescriptive standards. When these kinds of programs co-exist, they should be mutually supportive.

The existing risk communication programs pose further difficulties in that they require federal agencies to supervise and coordinate the activities of thousands of private firms, 50 state committees, and more than 3000 local committees. However, the agencies' enforcement strategies and capabilities have not developed sufficiently to ensure compliance with program requirements. OSHA and EPA, as well as any other agency considering a program requiring numerous private and public parties to disclose, distribute, and use risk information, should develop means of fostering compliance efforts of numerous designated parties, such as by joint government-private sector efforts--for example, by means of a joint council on chemical risk management. OSHA and EPA have identified the need to develop new collaborative relationships with private firms and state and local officials to achieve communication program goals. Current outreach efforts should be expanded as a supplement to agency enforcement strategy for private sector compliance. EPA should provide technical assistance and guidance to promote the compliance of state and local emergency response officials.

In addition, OSHA and EPA are now aware that the transfer of risk information to workers, local officials and community residents is creating additional needs for interpreting the information and guiding these recipients about appropriate actions to reduce risk. These agencies should therefore cooperate with appropriate state officials to ensure that workers and community residents will be able to understand and use the risk information they receive.

The Conference supports improvements in the use of risk information disclosure as a component of federal regulatory programs. The recommended measures can help ensure that the promise of this policy alternative is fulfilled.

RECOMMENDATION

A. Existing Programs of OSHA and EPA

1. OSHA and EPA should undertake a joint effort to improve the format and content of Material Safety Data Sheets (MSDSs), which are informational documents that must be provided and used by various designated parties for diverse purposes under both agencies' risk communication programs.[1] This joint effort should include participation by industrial firms, trade associations, labor and environmental organizations, medical and public health professionals, and state and local officials. OSHA and EPA should consider bringing representatives of these groups together for appropriate negotiations.[2] Particular attention should be given to improving the organization, clarity, consistency of terminology, and readability of the information provided in MSDSs so that they can be used more easily for developing safe workplace practices and worker training activities under the OSHA program and for

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[1] MSDSs contain information about hazardous chemicals, including the identity of the chemical, its physical and chemical characteristics, the nature of the hazards, primary routes of human exposure, permissible exposure limits, appropriate precautions, and first aid procedures. See 29 CFR §1910.1200(g).

[2] See, for example, ACUS Recommendations 82-4, 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§305.82-4 and 305.85-5.

developing emergency response plans by local officials under the EPA program.

2. OSHA and EPA should undertake a similar joint effort, including the participation of affected private parties, to facilitate the development of uniform MSDSs for commonly-used hazardous chemical substances. This effort should reduce the confusion caused by the proliferation of different MSDSs for the same substance and duplicative efforts by manufacturers in producing the MSDSs.

3. OSHA and EPA should improve the effectiveness of their compliance programs by providing increased technical assistance and guidance to the parties responsible for distributing and using the disclosed information--for example, by using their regional offices to conduct educational programs designed to promote awareness of program requirements and improve performance by designated parties. These agencies should also develop constructive relationships with industrial firms, trade associations, labor and environmental organizations, health professionals, the media, state and local officials, and affected communities to strengthen the worker training and local emergency response planning functions mandated by the programs.

4. OSHA and EPA should inform and guide state health officials with respect to their medical and health advisory functions, to improve the ability of those officials to provide useful guidance to workers and community residents in interpreting the risk information disclosed under the federal agency programs.

B. Generic Recommendations

1. Each federal agency with authority to regulate risks to health, safety, or the environment should evaluate its regulatory program and its statutory authority, to determine whether a program to communicate risk information to educate persons at risk would be beneficial. The agency should also determine whether such a program would be a permissible and useful component of the agency's regulatory program, as an alternative or complement to other measures. If the results of this evaluation are affirmative, the agency should take appropriate steps to develop a cost-effective risk communication program, being careful to prevent conflicts with any agency standard-setting or other regulatory activities. Agencies establishing new risk communication programs should work jointly with other agencies, as appropriate, to avoid duplication or conflict with existing regulatory programs.

2. In implementing a risk communication program, an agency should:

a. Ensure that the information content and communication procedures are appropriate for the intended purposes including: (i) informing and educating persons at risk as to hazardous conditions and suitable protective measures; and (ii) informing other parties, such as private firms and public agencies, so that they can discharge their designated responsibilities for producing, distributing, and using information appropriately.

b. Evaluate the performance of the various parties required to produce, distribute, and use the information, and identify obstacles to achieving program goals. The agency should then take appropriate remedial actions such as the provision of assistance to enable the intended recipients of the risk information to understand and use it to reduce risk; and the initiation of cooperative efforts with industrial firms, trade associations, labor and other interest groups, and other government agencies to improve the quality and usefulness of risk communication and compliance with program requirements.

c. Supplement traditional enforcement measures with additional methods for ensuring awareness of requirements and compliance by designated parties with very limited resources or expertise. Such methods may include, for example, cooperative programs with private firms, trade associations, and state and local officials to promote compliance.

3. In refining the scope of new or existing risk communication programs, agencies should, to the extent permitted by law, exclude from coverage insignificant or unlikely risks, to enhance the overall usefulness of the information to recipients.

Recommendation 90-4

Social Security Disability Program Appeals Process: Supplementary Recommendation

The Administrative Conference of the United States has undertaken numerous studies over the years relating to the appeals process in the Social Security Administration (SSA) disability program. It has issued four recommendations specifically involving the various levels of review in that program. It has also issued other more general recommendations involving various aspects of adjudicatory procedure. This recommendation is intended to supplement those previous recommendations to reflect the passage of time and experience. It is consistent with previous recommendations, but in some cases, it goes further, or makes suggestions in areas previously left unaddressed. Unless specifically noted, existing recommendations have not been superseded, and their provisions will not be repeated in this recommendation.

The SSA disability appeals process involves several steps. The initial determination of disability is made by federally-funded state Disability Determination Services (DDS). A dissatisfied claimant may seek a reconsideration by a different individual in the DDS. This reconsideration decision is appealable to an administrative law judge (ALJ) in SSA's Office of Hearings and Appeals, who holds a hearing on issues on appeal. If the claimant continues to be dissatisfied, he or she may appeal to the Appeals Council, which reviews the case and may in some instances permit supplementation of the record. Judicial review in the United States district court is available from an Appeals Council decision, which is considered to be final agency action.

PRIOR RECOMMENDATIONS

In 1978, ACUS issued Recommendation 78-2, "Procedures for Determining Social Security Disability Claims," 1 CFR §305.78-2, which primarily addressed the administrative law judge stage of the Social Security disability program. It recommended the continued use of ALJs, and made suggestions concerning the development of the evidentiary hearing record, including recommending that ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information.

In 1987, ACUS issued two recommendations relating to the disability program. Recommendation 87-6, "State-Level Determinations in Social Security Disability Cases," 1 CFR §305.87-6, addressed the first level of determinations and review in the disability program. Recommendation 87-7, "A New Role for the Social Security Appeals Council, 1 CFR §305.87-7, addressed the organization and function of the Appeals Council. Recommendation 87-6 was based on early results from demonstration projects involving the state-level disability determination process. It recommended additional experimentation with face-to-face procedures. Recommendation 87-7 suggested wide-ranging and substantial changes in the workings of the Appeals Council, including that it move away from its historical primary function as a case review panel. The recommendation suggested that the caseload be significantly limited, and that the Appeals Council focus on important issues on which it could issue precedential opinions.

In 1989, ACUS issued two further recommendations affecting the disability program. Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations," addresses a variety of issues involving medical decisionmaking at the state-level determination stage. It proposes enhancement of the role of medical decisionmakers, increased effort to develop medical evidence in the record, and improved training of medical staff on legal and program issues. It recommends use of optional face-to-face interviews and elimination of the reconsideration step. It also recommends that claimants be informed of deficiencies in the medical evidence prior to the issuance of a state-level determination, and that the opinion of a claimant's treating physician be given the weight required by court decisions and SSA rules. In addition, Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," recommends that agencies index and make publicly available adjudicatory decisions of their highest level tribunals, and further suggests that agencies not treating decisions as precedential reexamine those policies. This general recommendation would apply to the SSA Appeals Council.

SUPPLEMENTARY RECOMMENDATION

In 1989, the Social Security Administration asked the Administrative Conference to prepare a report that would describe the SSA disability process, review the relevant statutes, compare the process with disability programs under other statutes, and synthesize the relevant ACUS recommendations. The following supplementary recommendations are suggested by this report. These recommendations are consistent with the spirit, and in most cases, also with the letter of previous recommendations described earlier, but they address issues that have heretofore not been addressed by the Conference or have been addressed in a manner for which additional refinement is appropriate.

Decisions on social security claims that are issued at each level of the process need to contain information sufficient to allow the claimant to make an informed decision whether to appeal to a higher level. It is therefore important that the basis for the decision, including the facts found, be stated clearly. Further, where the record appears not to be complete, the decision should indicate what information is lacking, so that it can be provided at the subsequent level. These suggestions apply both to the initial decision at the state level and to the ALJ decision. The Conference recognizes that SSA rules already require most of this information in ALJ decisions, but more consistent implementation of these rules is needed.

The Social Security Act provides claimants the right to subpoena witnesses and information. Moreover, the Supreme Court made clear in *Richardson v. Perales*, 402 U.S. 389 (1971), that the availability of subpoenas may be critical to a claimant's ability to present relevant evidence. However, subpoenas are seldom issued in disability proceedings. The Conference believes that ALJs should be encouraged to issue subpoenas, and that claimants should be encouraged to seek them to complete the record. While the Conference recognizes that concerns exist about effective enforcement, it believes that such concerns should not prevent the issuance of subpoenas, and that the enforcement issue should be addressed separately. If enforcement of subpoenas appears to be a problem in the future, the Conference will consider studying the issue separately.

Prehearing conferences at the ALJ level could be used to streamline the hearing process by narrowing issues and ensuring that necessary evidence will be available at the hearing; in some cases the prehearing conference may eliminate the need for a hearing. However, such conferences should not be used to discourage claimants from seeking a hearing. Nor, except in rare cases, should they be used in cases involving *pro se* claimants, who might unknowingly waive rights or later opportunities to present evidence.

The Conference believes it is important that the evidentiary record be as complete as possible as early in the process as possible. It believes that the increased use of subpoenas will make this possible, in conjunction with the provision in Recommendation 89-10, ¶5 (c), that physicians asked to provide medical information in disability proceedings be adequately compensated. If a claimant is informed by the ALJ what information is still needed after the hearing, and is given an opportunity to supplement the record at that time, the need to supplement the record after the ALJ hearing should decrease.

The Conference is also recommending that the record before the ALJ be closed at a set time after the hearing. The procedure would give the claimant sufficient time to acquire such information as is needed to complete the record, and would also provide for extensions of time upon a showing of good cause.

As a corollary to this, the Conference is recommending that a procedure be developed for the ALJ to reopen a record upon petition by the claimant where there is new and material evidence relating to the period covered by the hearing. Such petitions could be filed within one year of the ALJ decision or while the case is pending before the Appeals Council if it has been appealed.[1] Under such a procedure, new evidence would be considered first by the ALJ, thereby giving the adjudicator most familiar with the case the first opportunity to review new evidence, potentially reducing the number of cases that would be presented to the Appeals Council, and giving the Appeals Council more of an appellate role. *See generally* Recommendation 87-7. The ALJ's decision not to reopen should be appealable to the Appeals Council. If the Appeals Council finds that new and material evidence did exist, it should generally remand to the ALJ for consideration of the evidence, except where substantial injustice or unreasonable delay would result.

These recommended procedural changes are not designed to limit the record in a disability case, but rather to impose additional structure on the process, by clarifying the rules and encouraging the timely production of evidence. It is expected that these changes will result in evidentiary records being completed in a more timely and efficient manner, thereby increasing the quality of the decisions based on those records.

The issues addressed in paragraph 5 of the recommendation, discussed above, were considered in Recommendations 78-2(C)(1) and 87-7(1)(c)n2. These previous provisions are subsumed within this recommendation.

RECOMMENDATION

The Social Security Administration (SSA) should make the following changes in the disability determination and appeals process:

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[1] These proposed procedures are distinct from and supplementary to SSA's generic "reopening" procedures set forth at 20 CFR 404.987-.989; 416.1487-89.

1. **Contents of Decisions:** SSA should require that disability benefit decisions, both at the state-level determination stage and at the administrative law judge stage, clearly provide in language comprehensible to claimants at least the following information:

   a. The date the application for benefits was filed.

   b. The date of onset of disability as alleged by the claimant.

   c. The date of onset of disability, if any, that has been determined by SSA.

   d. The period of time or category for which benefits have been denied, if any. Where benefits have been awarded for one period or category and denied for another period or category, the notice should clearly state that benefits have been partially denied.

   e. If any category of benefits has been denied for any period, a list of evidence considered, and an explanation of why benefits were denied, including why the evidence of record did not support the grant of benefits.

   f. The date of expiration of claimant's disability insured status (i.e., the "date last insured").

   g. The adverse consequences, if any, including preclusive effects, that will result from failure to appeal the decision.

2. **Prehearing Conferences:** The use of prehearing conferences should be encouraged in appropriate cases to frame the issues involved in the ALJ hearing, identify matters not in dispute, and decide appropriate cases favorably without hearings. Except in rare cases, such conferences should be held only where claimants are represented by counsel, and they could be held over the telephone where all parties agreed. A report on the conference, reflecting any actions taken, should be included in the record. Issues that should be considered at a prehearing conference include:

   a. Additional information that is required.

   b. Subpoenas that may be necessary.

   c. Witnesses that may be required.

   d. What issues are or are not in dispute.

3. **Subpoenas:** Administrative law judges' use of their subpoena power should be encouraged. Subpoenas should be issued *sua sponte* where necessary to ensure that medical evidence is complete, and to obtain other necessary evidence not otherwise available. Subpoenas should be issued when requested by the claimant except where the ALJ finds good cause not to issue a particular subpoena. SSA should develop form subpoenas for use by disability claimants, and provide instructions for their use. This recommendation is to be read in conjunction with

Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations."

4. **Closing of the Administrative Record:** The administrative hearing record should be closed at a set time after the evidentiary hearing. Prior to this, the ALJ should set forth for the claimant what information the claimant needs to produce to complete the record, issue any necessary subpoenas, and provide the claimant adequate time to acquire the information. Requests for extension should be granted for good cause, including difficulty in obtaining material evidence from third parties. The ALJ should retain the discretion to accept and consider pertinent information received after closure of the record and before the decision is issued.

5. **Introduction of New Evidence After the ALJ Decision:**

a. Upon petition filed by a claimant within one year of the ALJ decision or while appeal is pending at the Appeals Council, the ALJ (preferably the one who originally heard the case if he or she is promptly available) should reopen the record and reconsider the decision on a showing of new and material evidence that relates to the period covered by the previous decision. An ALJ's denial of such a petition should be appealable to the Appeals Council.

b. Appeals Council review of an ALJ's initial decision should be limited to the evidence of record compiled before the ALJ. Where the claimant seeks review of an ALJ's refusal to reopen the record for the submission of new and material evidence, the Appeals Council should remand the case to the ALJ (preferably the one who originally heard the case if he or she is promptly available), if it finds that the ALJ improperly declined to reopen the record. The Appeals Council should not review the merits itself or issue a decision considering the new evidence, unless remand would result in substantial injustice or unreasonable delay.[2]

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[2] Congress may at some time in the future need to consider whether it may want to provide for judicial review of Appeals Council determinations not to reopen the record. *Cf. Califano v. Sanders*, 430 U.S. 99 (1977).

Recommendation 90-5

Federal Agency Electronic Records Management and Archives

Federal agencies increasingly create, use, and store records in electronic rather than paper form. As this occurs, legal requirements and management efforts designed for paper records become progressively less satisfactory to ensure an adequate legal and historical record of government decisionmaking. Administrative Conference Recommendation 88-10 and the accompanying report addressed electronic acquisition of information and public access to and dissemination of electronic information. These recommendations complement Recommendation 88-10, and are not intended to amend that recommendation.[1] They focus on internal agency electronic records management, affecting long-term accessibility of public records through the National Archives. They are intended to make agencies sensitive to the issues involved.

Recommendation 1(a) parallels Part A of Recommendation 88-10. It starts with the premise that the basic policy balances have already been struck and does not seek to reopen them. Existing policy reflected in the records statutes[2] and in National Archives and Records Administration (NARA) and General Services Administration regulations and guidelines should be applied to the new electronic formats, with the objective that changing from paper to electronic media should not diminish the historical record of the government or its accessibility. There are some instances in which a rule designed for paper information, when applied to electronic information, may produce significant differences in result. In other instances, electronic formats present entirely new issues for records management, as with relational databases,[3] whose content is constantly changing, and whose use is different in character from traditional documents. In these instances, NARA and other agencies should identify explicitly the records management and records preservation issues presented and seek to resolve them in accordance with the basic purposes of a government-wide records management and archives system. The recommendation is not intended to discourage agencies from taking advantage of an enhanced ability to preserve additional records that may result from technological change.

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[1] These recommendations do not address such important issues as protection of trade secrets or privileged commercial information, invasion of personal privacy, or the need for Congress and agencies to consider allocating budgetary resources. Nor do they address computer security issues, which constitute an important, complex and specialized subject deserving independent consideration. Nothing in these recommendations is intended to diminish access to agency records through depository libraries.

[2] See, for example, the Federal Records Act and related statutes in 44 U.S.C. Chaps. 21, 22, 29, 31, 33 (1988).

[3] A "relational database" is composed of separate tables from which data are extracted and presented to a user as though they came from one database. A relational database is sometimes also a "distributed" database, meaning that it is made up of tables physically located at different places on a network.

Recommendation 1(a) also states that shifts toward electronic formats should not have the effect of changing the substantive legal rules or the opportunity for, or scope of, judicial review. This means that the evolution of rules concerning standing to enforce the requirements, and of the relationship between the Freedom of Information Act and the records statutes should continue, and that agency treatment of records in electronic formats should be subject to the same scrutiny as is applied to records in paper formats having the same content. In sum, the guiding principle should be that the content of the record, and not the format of its storage, should control the rules governing its retention and accessibility.

Recommendations 1(b) and 1(c) extend the basic principle of Recommendation 1(a) to public access. Electronic information formats have the potential to permit enhanced public access even as the volume of information grows, because of the potential for better indexes that are computer searchable and the possibility of free-text search. However, a great threat to long-term public access to electronic information formats is technological obsolescence, the possibility that, by the time someone wants to read information stored on electronic media the information will not be available. This threat must be avoided--not by refusing to accept electronic information formats, but by working to develop and adopt standards for information exchange. Such standards must also accommodate newer more sophisticated document and database structures such as hypertext--or other compound documents composed of graphical, audio, and video, as well as textual components--and relational distributed databases. Otherwise, solutions to technological obsolescence will themselves become obsolete as agencies adopt future technologies.

Recommendation 1(d) urges that records managers and archivists avoid archival practices that impair the use of electronic information technology in carrying out the agencies' programmatic activities. For example, it might not necessarily serve the public interest to prohibit stand-alone microcomputers on the grounds that records management functions can be accomplished with greater effectiveness on time sharing or other network systems.

Recommendation 1(e) encourages agencies to coordinate their use and development of electronic record-keeping technology and standards with the private sector to the fullest extent possible, and to avoid technologies and standards that, because of proprietary restraints or other limitations, would impede access to agency information and transfer to the National Archives.

Recommendation 2 addresses problems relating to preservation of the electronic records of agencies and commissions that are established on a temporary basis.

Recommendation 3 urges that NARA take a more active role in showing agencies how to harmonize records preservation objectives with agency modernization, and in exploring standards that can mitigate potential problems of incompatibility and technological obsolescence. While NARA's reluctance to adopt document transfer or database transfer standards that do not have an established commercial base is appropriate, NARA should also take the initiative in promoting the development of appropriate standards through private standard-setting organizations,[4] and should encourage agencies to make use of available commercial products embracing the most promising standards.

Agencies also need guidance with respect to questions relating to admissibility of electronic records as evidence and other reliability issues.[5] The Conference encourages the Department of Justice and the Office of Management and Budget to expedite their current efforts in this regard.[6]

In carrying out these recommendations, agencies are reminded to comply with the Federal Information Processing Standards.[7]

RECOMMENDATION

1. Federal agencies, including those responsible for archival and records policy, should ensure that:

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[4] See ACUS Recommendation 78-4, Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1 CFR §305.78-4.

[5] Legal issues relating to reliability include signature requirements and contract documentation. See, for example, the federal statutory counterpart to the Statute of Frauds, 31 U.S.C. §1501.

[6] The Conference is prepared to work with the Department of Justice and the Office of Management and Budget to provide appropriate guidance for agencies.

[7] "FIPS" Publications are issued by the National Institute of Standards and Technology after approval by the Secretary of Commerce, pursuant to section 111(d) of the Federal Property and Administrative Services Act of 1949, as amended by the Computer Security Act of 1987, Public Law 100-235.

(a) changes in the technology of record-keeping, including the use of electronic systems in creating records and the transfer of records from paper to electronic formats, do not (i) alter the criteria for identifying material to be retained as a temporary or permanent record for eventual transfer to the National Archives, (ii) have the effect of altering the opportunity for, or scope of, judicial review of agency compliance with records law, or (iii) otherwise alter the substance of records law;

(b) changes in the format of agency information from paper to existing and future electronic media do not reduce the accessibility of information to the public;

(c) accessibility is not degraded by technological obsolescence of electronic formats;

(d) policies and procedures aimed at enhancing records management complement and, in any event, do not impair the utility of information systems for the performance of agency missions; and

(e) maximum use is made of generally available technology and, whenever feasible, that agencies conform to standards that are widely agreed to and in use in the private sector.

2. Temporary agencies and commissions should, in consultation with the National Archives and Records Administration (NARA), manage their electronic record-keeping (consistent with the agency's mission) in such a way as to ease the transfer and preservation of their records upon the agency's dissolution.

3. NARA should promote the development and implementation of standards for text, database, and other forms of electronic records, and should seek out opportunities for pilot and demonstration projects, covering candidates for standards for text and database information that can ensure the transferability of such information from agencies to NARA and ensure long-term accessibility to the public. NARA and the White House Office of Administration should develop concepts for a turnkey presidential records system that could go to a presidential library along with electronic presidential records, providing immediate public access to records to which access is permissible.

Recommendation 90-6

Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission

The Occupational Safety and Health Review Commission (OSHRC) is an independent agency charged with adjudicating contested citations and penalties brought against employers by the Occupational Safety and Health Administration of the Department of Labor (Labor). Labor is responsible for promulgating substantive safety and health standards, conducting workplace inspections and investigations, and prosecuting contested cases before administrative law judges (ALJs) at OSHRC. If an inspection discloses alleged violations, a citation describing the violation is issued along with a notice of proposed penalties. An employer who disagrees with a citation or proposed penalty can file, within 15 days of receipt, a simple notice of contest. Ordinarily, Department of Labor lawyers must respond to the notice of contest with a relatively detailed complaint, and employers must set forth allegations of facts which serve as the basis for affirmative defenses. The case is then handled through a litigation process that provides for discovery, motion practice, formal hearings governed by the Federal Rules of Evidence,[1] and written opinions.

OSHRC also offers parties another path, that of "simplified proceedings" which modify significantly the litigation process.[2] There are no pleadings; pre-hearing discovery and motion practice are expressly discouraged; and interlocutory appeals of an ALJ's rulings are not permitted. In lieu of pre-hearing discovery, the parties are required to engage in discussions with a goal of addressing settlement, narrowing issues in dispute, and developing an agreed statement of issues and facts. These unstructured discussions are supposed to occur within a reasonable time before a "conference/hearing," a hybrid procedure divided into two phases--a conference that can often operate as a dispute resolution tool and then an informal hearing that normally takes place on the same day. Under current OSHRC rules, any party may request a simplified proceeding (subject to certain subject-matter limits) within 10 days after a notice of docketing is received, and any other party may veto use of the device. The vast majority of requests for simplified proceedings come from *pro se* respondents, with the Department of Labor historically vetoing most of these requests. Evidence suggests that where the simplified proceedings are agreed to--5% or less of OSHRC's national caseload--settlements are common.

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[1] 29 CFR 2200.71 (1989).

[2] 29 CFR 2200.202-.211 (1989). In addition, OSHRC's regulations provide for use of settlement judge procedures, 29 CFR 2200.101 et seq. A recent study for the Conference also examined OSHRC's use of this technique and concluded that OSHRC's procedures in this regard were consistent with Conference Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR 305.88-5 (1990). Nothing contained herein is intended to detract from that recommendation.

While the basic concept of simplified proceedings is hardly controversial, putting it into practice has been. Several commentators have expressed concerns about the "underutilization" of these proceedings, and called for vesting in respondents or ALJs final authority for deciding whether to use them. Others caution that agreeing to use simplified proceedings could involve surrender of meaningful procedural rights at a point early in the case when one or more parties may be unaware of all the issues or evidence likely to be implicated. Some maintain that simplified proceedings are redundant since, in practice, they are not so different from the procedures that knowledgeable parties before OSHRC sometimes work out informally.

The Conference does not now take a position on these issues, or on the effectiveness of current OSHRC procedures.[3] Major shifts in the structure of OSHRC simplified proceedings would themselves give rise to new uncertainties and difficulties of implementation. They should be undertaken only after careful analysis of the procedural, legal, policy, and practical implications. In the meantime, the Conference urges the Department of Labor and OSHRC to take steps to expand the use and effectiveness of simplified proceedings, especially those involving *pro se* respondents, as stated in the following recommendation.

RECOMMENDATION

1. The Occupational Safety and Health Administration (OSHRC) and the Department of Labor should develop rules or policies tailored to handling cases involving *pro se* parties of limited means in simple cases involving few alleged violations and low penalties. The Department of Labor should experiment selectively with what OSHRC has characterized as "simplified

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[3] The aforementioned study focused only on operation of settlement judge and simplified proceedings in certain cases before OSHRC. Further study may be useful to explore the operation of OSHRC's current adjudication procedures, including relevant structural and policy issues.

proceedings" in order to gain a broader base of experience and to obtain a clearer picture of the kinds of cases suitable for those proceedings. Department of Labor attorneys should adopt a policy of promptly initiating discussions with *pro se* parties in an effort to narrow issues or resolve disputed matters. The Department should develop a set of criteria to assist its attorneys in deciding whether to request, or agree to requests seeking, use of simplified proceedings. OSHRC and the Department should also develop simplified paperwork, special *pro se* form answers and other documents, and other procedures to inform *pro se* parties more fully and thus enhance use of simplified proceedings.

2. OSHRC should modify its simplified proceedings to encourage parties to make greater use of them. For example, OSHRC should facilitate exchanges of information via short-form or oral pleadings and limited discovery in some cases. OSHRC should also take steps to ensure that its administrative law judges (ALJs) regularly enforce its rule[4] requiring parties in simplified proceedings to discuss simplification and settlement.

3. OSHRC should continue the simplification of its procedures after study of the relevant issues and consultation with representatives of all affected interests, including the Department of Labor, employer associations, relevant bar committees, and unions. The objective should be greater use of the pre-hearing conference through involvement of the presiding judge in the case. Pre-hearing conferences could result in settlement of all matters in controversy or an identification of those issues still requiring a hearing. If a hearing is found necessary, it should follow immediately and should be held before the ALJ who has identified the issues in controversy.

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[4] 29 CFR 2200.206 (1989).

Recommendation 90-7

Administrative Responses to Congressional Demands for Sensitive Information

The routine sharing of information between congressional committees and administrative agencies constitutes one of the most important interactions between the political branches of our national government. The process of exchanging information affects the ability of the executive and legislative branches to carry out their constitutionally assigned tasks. The quality of Congress' legislative and oversight work often depends on agency information. The control of the disclosure of sensitive information also affects the executive's ability to fulfill its functions.

The Constitution of the United States operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Because it does not expressly acknowledge a congressional entitlement to information or an executive prerogative to withhold information, the Constitution provides less a set of clearly understood rules than a framework within which each branch articulates its asserted right to demand or withhold information.

The judicial view regarding disputes over sensitive information between the political branches, as distilled from a very few opinions, respects elements of the views of both branches. While several cases imply what the Supreme Court's view might be,[1] there is no Supreme Court adjudication of any executive privilege dispute with Congress. Consequently, there is no opinion that resolves the principled contentions that such disputes involve.

By all accounts, most congressional demands for information are handled without confrontation, and it is clear that agencies generally respond to requests by providing whatever information Congress is seeking. Moreover, the branches do have a strong and continuing interest in the success of their overall relationship, despite an institutional competitiveness that is augmented when the two branches are controlled by different parties. Nevertheless, serious contentious cases do arise, especially in areas of great concern to the public, and improved mechanisms for resolving such disputes would benefit both political branches, as well as the courts, which shy away from involvement in such cases.

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[1] See *U.S. v. Nixon*, 418 U.S. 683 (1974) which held that the executive has a constitutionally based privilege to withhold information, the release of which would impede the performance of executive branch responsibilities. See also *McGrain v. Daugherty*, 273 U.S. 135 (1927) which recognized a constitutionally implied power of congressional investigation and said further that Congress need not have before it a specific legislative purpose in order to trigger its investigative authority.

An understanding of the several factors that may affect the outcome of particular demands as well as the process by which a resolution is achieved is required if improvements are to be recommended for resolving information disputes in a way that enables both branches optimally to fulfill their constitutional functions. One major factor affecting the successful navigation of a dispute is the perceived stakes or interests of each branch. What is at stake for Congress is usually the performance of one of its primary functions. These include routine oversight, the contemplation of possible legislation, the review of nominations requiring the advice and consent of the Senate, or the investigation of possible official wrongdoing. The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These include protecting national defense and foreign policy secrets, protecting trade secrets or confidential commercial or financial information, protecting the candor of presidential communications or intrabranch policy deliberations, preventing unwarranted invasions of personal privacy, whether of government officials, employees, or private persons, and protecting the integrity of law enforcement investigations and proceedings. In some cases, the executive may regard such information as sensitive, meaning that its disclosure could compromise the capacity of the executive branch to discharge its constitutional or statutory responsibilities. Disputes over information often have a purely political basis as well. Congress may seek information in an effort to gain particular political advantage; the executive may seek to withhold such information to cover up mistakes.

The prospects for a nonconfrontational resolution are good if the branches perceive that a particular dispute boils down to a contest only between Congress' ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns mentioned, rather than a fundamental readjustment in the institutional power of each branch in relation to the other. Accommodation is possible in such a situation because several intermediate arrangements exist between complete disclosure or complete non-disclosure that allow for a balance of the branches' competing interests.

Among the intermediate arrangements available for settlement of a dispute are: (1) the release of information by the executive in timed stages that allow it to conclude a law enforcement investigation or policymaking process without premature scrutiny; (2) the release of information under protective conditions ranging from Congress' promise to maintain confidentiality to congressional inspection of the materials requested while they remain in executive custody;

(3) the release of requested information in expurgated or redacted form; or (4) the release of the requested information in the form of prepared summaries.

Important, however, to the resolution of disputes along these lines is the formation of a new operational process or arrangement. Under this arrangement, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the arrangement would contain agreements aimed at steering negotiations away from categorical questions of prerogative and toward the pragmatic resolution of immediate disputes. Toward that end, an arrangement should specify at least those interests in the control of the information that each branch could invoke in negotiations, a commitment to invoke those interests in highly specific terms should disputes arise, and a commitment to explore in negotiation how the interests of each branch would be advanced or harmed in the particular dispute by the use of various compromise strategies attempted in the past.

The scope of the new arrangement should include both executive and independent agencies. There is nothing in the constitutional relationship--as distinguished from the statutory relationship--between administrative agencies and either Congress or the President that suggests that labeling an agency as executive or independent yields greater or lesser authority for the President to control agency information or greater or lesser authority for Congress to demand information. In addition, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information.

Congress might also consider placing in one office the responsibility of coordinating the negotiation of disputes with the executive over information. This would be akin to the practice of the executive branch with respect to the Office of Legal Counsel at the Department of Justice which stores information regarding the resolution of disputes and provides counsel to agencies embroiled in disclosure disputes. At a minimum, Congress ought to more regularly familiarize its members with the information and counsel that the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House of Representatives can provide to committees that are engaged in disputes over information. Congress should consider alternative means for resolving particularly controversial cases in addition to the current criminal contempt procedures. Alternatives could range from third-party mediation to referral to other agencies or to less draconian judicial procedures.

RECOMMENDATION

1. Congress and the President should create an on-going process for negotiating the conditions under which sensitive information[2] in the agencies should be disclosed to or withheld from Congress.

2. This operational arrangement should seek to achieve improved cooperation and relations between the executive and Congress. Specifically, the executive should respect Congress' legitimate legislative and oversight interests, including the pressure of time and the need to have information immediately available. In return, Congress should respect the executive's legitimate interests including, for example, protection of confidentiality in matters pertaining to presidential communications, national security, civil and criminal law enforcement, personal privacy and commercial confidentiality, and the free-flow of staff advice that might be inhibited by outside scrutiny of deliberative documents. However, both branches should invoke these interests only in highly specific terms and should commit themselves to explore in negotiation how the interests of the branches could be reconciled. In designing this arrangement, Congress and the executive should consider adding mechanisms for dispute resolution beyond the negotiations and discussions that currently take place.

3. Such an arrangement need not require legislation, but should be memorialized in some fashion. Counsel of both Houses of Congress and the Office of Legal Counsel in the Department of Justice should retain information concerning the informal resolution of disclosure disputes. Appropriate consideration should also be given to roles these Counsel can play as sources of advice regarding disputes over sensitive information.

4. In addition, Congress should consider establishing procedures for resolving impasses over congressional access to sensitive agency information which could be invoked to help resolve exceptional cases as an alternative to contempt proceedings.[3]

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[2] Sensitive information is defined as information whose public disclosure could compromise the capacity of the executive to discharge its constitutional or statutory responsibilities.

[3] An example worth consideration might be a declaratory judgment procedure that could be invoked by Congress or the agency after the exhaustion of informal means--such as negotiations between the congressional committee leadership and the agency head--for resolving disputes in

5. No general distinction should be made between executive and independent agencies for the treatment of contested information for resolving disputes over sensitive information.

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which some type of adjudication appears unavoidable. (To avoid constitutional problems, any action brought by an agency under this proposal should be filed against the congressional employee who served the subpoena in question.) In addition, particularly controversial cases might be referred for resolution to *in camera* panels consisting of retired federal judges, members of Congress, or executive branch officials. Other disputes might be avoided by designating an issue of controversy for study by the General Accounting Office.

Recommendation 90-8

Rulemaking and Policymaking in the Medicaid Program

The Medicaid program is a joint federal/state health and long term care insurance program for eligible poor persons in the United States.[1] The Health Care Financing Administration (HCFA), in the Department of Health and Human Services (HHS), administers the Medicaid program at the federal level. The states have primary responsibility for implementing the Medicaid program. To participate in the Medicaid program and receive federal financial participation in state Medicaid expenditures, states must submit a plan to HCFA detailing how the state will comply with federal statutory and regulatory requirements in the design and implementation of its Medicaid program. The relationship between HCFA and the states in the administration of Medicaid has been complicated in recent years by the volume and complexity of congressionally-mandated program changes and HCFA's reluctance or inability to promulgate implementing regulations, policies, or other guidance in a timely manner. This recommendation addresses the relationship between Congress, HCFA and the states in the administration of the Medicaid program and, in particular, suggests changes to promote a more effective rulemaking and policymaking process and more efficient implementation of rules and policies.

Since 1981, Congress has almost annually made a large number of changes in the Medicaid program. Of primary concern is that Congress, in annual budget legislation (often in the last days of a session), has either made the expansion of benefits effective regardless of whether or not HCFA promulgates implementing regulations or other guidance by a certain date or has made the expansion effective immediately.[2] These provisions place a great burden on HCFA to issue rules, policies, or other guidance at an accelerated pace and, due to this time pressure, as well as HCFA's reluctance or inability to promulgate implementing regulations and policies, states are often forced to implement program changes without federal guidance. If Congress has directed states to proceed without HCFA guidance, HCFA may still want states to proceed according to its interpretation of the statutory policy. HCFA may issue rules or, more likely, policy guidance on the matter. While HCFA does promulgate legislative rules pursuant to §553 of the APA,[3] it more often issues interpretative or procedural rules in its manuals for states, such as the *State Medicaid Manual.* HCFA also issues policy guidance through serially numbered program memoranda or letters, often from its regional offices to states.

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[1] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended as 42 U.S.C. §§1396-1396s (1982 & Supp. V 1987).

[2] See, e.g., Deficit Reduction Act of 1984, §2361(d)(1), Pub. L. No. 98-369, 98 Stat. 494, 1104 (1982 & Supp. V 1987); Consolidated Omnibus Budget Reconciliation Act of 1985, §9501, 100 Stat. 201, 42 U.S.C. §1396a (Supp. V 1987); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1984 (1986); Medicare Catastrophic Coverage Act of 1988, §301, Pub. L. No. 100-360, 102 Stat. 748-64; Omnibus Budget Reconciliation Act of 1989, §6401 et seq., Pub. L. No. 101-239, 103 Stat. 2106, 2258 (1989); and Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, November 5, 1990.

To implement congressionally-mandated program changes or HCFA rules and policies, states must take specific steps. At the very least, they must submit a plan amendment to HCFA that outlines how the state agency will implement the federal policy change. HCFA must approve or disapprove the state plan amendment within 90 days or request additional information--a step which starts another 90-day period on HCFA action on the plan amendment from the time HCFA receives the information from the state. A state may obtain reconsideration of HCFA's disapproval of a plan amendment by HHS within 60 days and then judicial review in the United States Court of Appeals for the circuit in which the state is located. A plan amendment which expands eligibility, services, or payment is effective no earlier than the first day of the quarter in which the proposed plan amendment is submitted and states may receive federal financial participation back to that date. To protect their rights to the federal payment under congressional appropriations legislation for the Medicaid program, states sometimes expend funds for expanded benefits and other program changes requiring additional funds, upon submitting a proposed plan amendment to HCFA. However, states are subject to HCFA-imposed penalties in certain circumstances. One such action is a "disallowance action" in which HCFA retrospectively disallows the federal payment for state Medicaid expenditures on grounds that a particular expenditure did not meet federal requirements. In addition, under the Medicaid quality control system, claims paid on the basis of determinations regarding eligibility of beneficiaries that are later found to be contrary to federal policy can be viewed as errors for purposes of calculating the error rate penalty which reduces federal payment to the states.

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[3] In 1971, HHS announced that it would observe notice-and-comment rulemaking procedures under §553 of the Administrative Procedure Act (APA), notwithstanding the exemption in §553(a)(2) for rules concerning government benefits.

In recent years, HCFA has, as a general matter, had difficulty promulgating its rules and policies in a timely manner. These delays have imposed hardships on states that are required by Congress to implement statutory changes regardless of whether HCFA promulgates regulations. Where HCFA has failed to issue rules or policy, does not act expeditiously on a state's plan amendment to implement a congressionally-mandated change, or promulgates new rules or policies strictly interpreting a legislative program change, states are at risk of having to return the federal payment if HCFA determines that a state's proposed plan amendment inaccurately implements the statutory change.

Problems in HCFA rulemaking are further complicated by the persisting dilemma of whether agency rules and policies are legislative rules requiring §553 notice-and-comment rulemaking procedures. In this regard, Recommendation 76-5 of the Administrative Conference could be a useful approach to HCFA rule and policymaking.[4] This recommendation urges agencies to publish and seek comment on all significant interpretative rules of general applicability before promulgation or, at least, seek comment on such rules and policy statements after promulgation. The use of negotiated rulemaking, based on recommendations of the Conference, might also be useful for program changes amenable to negotiation between HCFA and the states as well as providers and beneficiaries.[5]

This recommendation seeks to resolve the difficulties in the HCFA rulemaking and policymaking process which have complicated the administration of the Medicaid program by urging HCFA to issue rules and policy statements promptly, to complete interim-final rulemakings without delay, to make rules and those policies readily accessible to the public, and to refrain from penalizing states that must implement congressionally mandated changes and have properly submitted a proposed plan amendment.

This recommendation also urges Congress to consider the consequences of imposing statutory deadlines on implementing statutory changes, to consult with HCFA and the states before enacting program changes, and to allow states sufficient time to engage in appropriate rulemaking procedures. The Conference especially urges Congress to examine the Medicaid program's daunting complexity with a view toward making eligibility, scope of benefits, and payment requirements more comprehensible for beneficiaries and providers and easier for states to administer. At present, the Medicaid statute has become unduly complex because of the annual overlay of new statutory amendments in these areas. A recodification of Title 19 of the Social Security Act, the Medicaid statute, is urgently needed to make the statute and the numerous amendments enacted in the last decade more comprehensible.

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[4] ACUS Recommendation 76-5, "Interpretative Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5.

[5] ACUS Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§305.82-4, 85-5.

In view of the complexity of the Medicaid program and the lack of understanding among Congress, HCFA, and states, as well as provider and beneficiary representatives, of one another's respective positions regarding the need for statutory changes in the Medicaid program and the difficulties in the implementation of these changes, it would be advisable to convene a conference on rulemaking and policymaking in the Medicaid program.

RECOMMENDATION

A. Recommendations to HCFA.

1. When Congress makes any changes to the Medicaid program, HCFA should act promptly to issue rules, policies, and other guidance implementing such changes. Insofar as resource constraints necessitate making choices about the priority in issuing rules and policies, priority should be given to program changes which Congress has identified for prompt implementation or where agency guidance is particularly necessary for their implementation.[6]

2. Where HCFA finds it necessary to promulgate an interim final rule to implement Medicaid program changes, HCFA should permit a subsequent comment period and should avoid delays in publishing its response to the comments and any modification of the rule.[7]

3. HCFA should ensure that all rules and policies affecting the administration of the Medicaid program--whether promulgated pursuant to §553 of the APA or issued in the form of manuals, program memoranda, or letters to states--are readily available to the public at

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[6] ACUS Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 1 CFR §305.87-1, offers several suggestions as to priority setting and management of the rulemaking process that may be useful to HCFA.

[7] The Administrative Conference is currently undertaking a study of agency use of interim final rules.

convenient locations.[8] HCFA should also publish an updated list of such materials in the Federal Register quarterly.[9]

4.

a) When Congress requires states to implement Medicaid program changes, HCFA should not penalize states in a disallowance action or impose an error rate penalty if the state has incurred greater Medicaid expenditures than a subsequently issued HCFA rule or policy would otherwise allow. This recommendation applies only where Congress mandates that states change their Medicaid programs with or without HCFA guidance, and where, in the absence of such guidance, a state has submitted a state plan amendment reflecting a reasonable interpretation of the statute to implement the change.

b) Where HCFA issues rules, policies, or other guidance resulting in a program change, it should provide a reasonable grace period (in which penalties are not imposed for noncompliance) to enable states to comply with the new HCFA requirements. This recommendation does not apply where such guidance, in essence, only tracks the statutory language. As a general matter, HCFA should avoid retroactive program changes.

B. Recommendations to Congress.

1. In view of the Medicaid program's daunting complexity with regard to eligibility, scope of benefits, and payments to states and providers, Congress should seek to simplify and clarify these program areas in the Medicaid statute, so far as practicable, to make the program more comprehensible for beneficiaries and providers and easier for states to administer. Before enacting changes in the Medicaid program, Congress should consult with all parties (particularly HCFA and the states) knowledgeable about the complexities of implementing proposed program changes. Congress should avoid reliance on last-minute budget reconciliation negotiations to make major Medicaid program changes without having first obtained a clear understanding of how HCFA and the states can implement these changes.

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[8] HCFA should devote greater attention to implementing its own salutary regulation in this regard, 42 CFR §431.18.

[9] See ACUS Recommendation 87-8, "National Coverage Determinations Under the Medicare Program," 1 CFR §§305.87-8 and Recommendation 89-1, Peer "Review and Sanctions in the Medicare Program," 1 CFR §305.89-1.

2. Before establishing statutory deadlines for implementing legislative changes in the Medicaid program, Congress should consider whether such deadlines allow HCFA and the states adequate time to promulgate the requisite rules or policies and to take other necessary steps for their proper implementation. Where Congress mandates a complex program change to be implemented at the state level, it should allow states reasonable time to make necessary adjustments (e.g., state legislative action or state rulemaking procedures) before the changes become effective.

REPORTS
FOR
RECOMMENDATIONS 90-1 THROUGH 90-8

Report for Recommendation 90-1

Imposing Civil Money for Violations of the Federal Aviation Regulations: Implementing a Fair and Effective System

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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Although long ensconced in other areas of administrative law,[1] the administrative imposition of civil money penalties is novel, controversial, and precarious in the area of civil aviation safety regulation.[2] Only since December 30, 1987, has the Federal Aviation Administration ("FAA") had general statutory authority--under the Civil Penalty Assessment Demonstration Program ("Demonstration Program")--to impose civil money penalties for violations of the safety provisions of the Federal Aviation Act and its implementing safety regulations.[3] And the authority has never been permanent. Congress initially provided the Demonstration Program with a two-year term, due to expire on December 30, 1989.[4] With the program mired in controversy as the demonstration period came to a close, Congress enacted a four-month extension to permit further study.[5] But Congress's clear if implicit message[6] was that changes--of a character not yet specified--must be made if Congress is to provide a continuing authorization of the administrative imposition of civil money penalties for violations of the Federal Aviation Act of 1958[7] and its implementing Federal Aviation Regulations ("FARs").

This report addresses the questions of whether and how civil money penalties should be imposed administratively under the provisions of the

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[1] *See* Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435 (1979).

[2] Prior to 1987, the Federal Aviation Administration had authority to impose civil money penalties administratively only in cases involving violations of the Hazardous Materials Transportation Act, 49 U.S.C. App. 1801 *et seq.*, or any rule, regulation, or order issued thereunder. See 49 U.S.C. app.. 1471(a)(1) and 1809 (1982). Although novel and controversial in the enforcement of aviation safety regulations, administratively imposed civil money penalties have been used at least since 1978 to enforce various types of economic regulations that are imposed by the Federal Aviation Act and implementing rules and regulations issued thereunder. On the history of federal aviation regulation and the various modes of enforcement used for different types of regulations at different times, *see* note 12 *infra*. This report, however, is concerned exclusively with aviation safety regulations and their enforcement. Subsequent references to the Federal Aviation Act and its implementing regulations should therefore be understood as referring solely to those provisions of the Federal Aviation Act and its implementing regulations that pertain to aviation safety.

[3] *See* Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, tit. II, sec. 204(g), 101 Stat. 1486, 1520 (codified at 49 U.S.C. app.. 1475 (1982 & Supp. V 1987)).

[4] *See id.*

[5] *See* 135 Cong. Rec. D. 1421 (Nov. 21, 1989). The legislation was subsequently signed by the President. *See* 135 Cong. Rec. H. 9745 (Dec. 11, 1989).

[6] *See* U.S. House of Representatives Report 101-371, 101st Congress, 1st Sess., Extension of Civil Penalty Assessment Demonstration Program.

[7] Pub. L. 85-726, 72 Stat. 731, codified as amended at 49 U.S.C. app. 1301-1541 (1982 and Supp. V 1987) (hereinafter referred to simply as "the Federal Aviation Act").

Federal Aviation Act that pertain to aviation safety and their implementing safety regulations. These questions arise in a broad context of administrative law, practice, and policy. But they are also sharply framed, in a practical sense, by the controversy surrounding the Demonstration Program and by the debate over whether that program ought to be extended and, if so, in what form. Although broader issues about the optimal design of an administrative enforcement system will be considered in passing, this report deals principally with the issues that are most immediately pressing: Should civil money penalties be imposed administratively? If so, in what forum--one provided by the FAA and its parent agency the Department of Transportation ("DOT")[8] or by the independent National Transportation Safety Board ("NTSB")--should administrative adjudications occur? And what procedural rules should be followed?

My basic conclusions take the form of answers to these questions:

(i) A system of administrative imposition of civil money penalties should be continued.

(ii) The preferable forum for administrative adjudication and imposition of civil money penalties is the National Transportation Safety Board.

(iii) If the NTSB is assigned this adjudicatory responsibility, it could apply the procedural rules that it currently employs in adjudicating another category of cases under the Federal Aviation Act and its implementing regulations.

(iv) The NTSB must be given substantial additional resources in order to assume the responsibility of adjudicating the civil money penalty cases now within the Demonstration Program.

(v) If adjudicatory authority is transferred to the NTSB, Congress should also clarify the division of responsibilities between the safety Board and the FAA; in particular, it should specify the deference that the NTSB should give to the FAA's interpretations of aviation safety regulations and, in cases in which violations are found, to the FAA's determinations as to appropriate sanctions.

(vi) Congress should clarify that the FAA has discretion to compromise disputed civil money penalty cases without requiring a formal finding of a violation.

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[8] Under the Demonstration Program, disputed cases are decided in the first instance by an ALJ within the Department of Transportation, subject to administrative review by the FAA Administrator. *See* 49 U.S.C. app.. 1475 (1982 & Supp. V 1987); 14 CFR 13.233 (1989). Judicial review is also available. *See* 49 U.S.C. app. 1486(e) (1982).

(vii) The FAA should be authorized to seek judicial review of adverse decisions of the NTSB in cases involving issues of significant public interest.

(viii) If provision of adequate resources to the NTSB should prove impracticable, the NTSB could not reasonably be asked to adjudicate FAA actions for civil money penalties, and adjudicatory responsibility should--as under the Demonstration Program--be retained within the FAA and its parent agency, the Department of Transportation.

(ix) If adjudicatory responsibility continues to be so vested, the FAA should promulgate revised rules of practice. Prior to issuing a final rule, the agency should give notice of a proposed rulemaking and invite comments from interested parties, and it should give careful consideration to proposed revisions.[9]

The report's organization is as follows. Part I describes the statutory framework in which the Demonstration Program is located. It outlines the respective roles of the FAA and the NTSB, the main types of civil penalties for violations of statutes and regulations relating to aviation safety, and the procedural structures through which those penalties are assessed. Part II discusses the operation of the Demonstration Program itself. It reviews the available statistics and sketches the reasons why the Program has proved so controversial. Part III argues that a properly designed system of administrative assessment of civil money penalties would serve the interests of aviation safety and administrative rationality, and that it would also benefit the aviation community by furnishing fair but inexpensive adjudication. Part IV turns to questions of design and implementation. It concludes that the NTSB is the preferable administrative forum. It also offers subsidiary recommendations concerning the NTSB's need for resources and the appropriate relationship between the FAA and the NTSB. Part V deals with issues of second-best. If adjudicative authority in civil money penalty cases were to be retained in the FAA and its parent, the DOT, this Part considers how the agency's rules of practice might be improved. Part VI, which offers a few concluding remarks, is followed by a summary appendix of "Recommendations."

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[9] A subject that this report will not address is the FAA's selection of substantive enforcement priorities. The Air Transport Association of America ("ATA"), which represents the major commercial airlines that are subject to FAA regulation, has complained bitterly that the FAA has "devoted two-thirds of its civil penalty resources to litigation about sneaking fake guns through domestic airports"; that it has done so "to try to raise money and to generate headlines for the agency and political appointees"; that "there is no indication security has been enhanced" as a result, since there was no substantial threat of hijackings even at the outset; and that the agency, as a result of its excessive activity with respect to simulated weapons, has failed to deploy its resources to deal with greater safety problems, such as unlawful shipments of hazardous materials. *See* Comments of the Air Transport Association of America to the United States Congress About the Civil Penalty Assessment Demonstration Program of the Federal Aviation Administration ("ATA Comments") 3-7 (September 14, 1989). The FAA, of course, defends its simulated weapons tests as important to ensure safety. *See, e.g.*, U.S. Department of Transportation, Federal Aviation Administration, Report to Congress on the $10,000 Miximum Civil Penalty and the Civil Penalty Assessment Demonstration Program 6-8 (July 1989) (hereinafter "FAA Report to Congress"). Because the FAA has sought penalties for simulated weapons violations largely through the system of administrative adjudication and penalty imposition established by the Demonstration Program, the ATA has at times argued as if the Demonstration Program's procedural scheme and the FAA's controversial enforcement policies and priorities were two sides of the same coin. For purposes of systemic design, however, they are not, and they will not be so treated in this report. This report will be concerned with questions about the appropriate structure of a system for the imposition of civil money penalties--not with the substantive enforcement priorities of the agency utilizing that structure.

I. The Statutory Framework

The federal statutory scheme that provides for the regulation of civil aviation has emerged more through historical accident than conscious design. Beginning with the Air Commerce Act of 1926,[10] Congress has vested regulatory responsibilities in a succession of federal agencies.[11] Since 1940, however, no agency has had a monopoly of administrative authority in the area of civil aviation.[12] Today there are two administrative agencies with important responsibilities in the general domain of aviation safety: the Federal Aviation Administration and the National Transportation Safety Board. Although more will be said about each agency in due course, it is important to fix their general responsibilities at the outset.

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[10] Act of May 20, 1926, ch. 344, 44 Stat. 568 (codified at 49 U.S.C. app. 171-84; repealed in 1938 and 1958).

[11] These include the Department of Commerce, the Civil Aeronautics Authority, the Civil Aeronautics Board, the Civil Aeronautics Administration, the Federal Aviation Administration, and the National Transportation Safety Board. For a brisk overview of the history, *see* Hamilton, Appellate Practice in Air Safety Proceedings, 10 Southwestern U. L. Rev. 247, 247-49 (1978).

[12] Under the Air Commerce Act of 1926, *supra* note 10, and the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (codified at 49 U.S.C. app. 1301-1542 (1982)), enforcement authority and hearing authority were both located entirely within one agency--the Department of Commerce under the 1926 Act and the independent Civil Aeronautics Agency under the 1938 Act. But Reorganization Plans III and IV of 1940, 54 Stat. 1231 sec. 7 and 54 Stat. 1235 sec. 7 respectively, divided authority between the newly created Civil Aeronautics Authority and Civil Aeronautics Board. The Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified at 49 U.S.C. app. 1301-1541 (1982 & Supp. V 1987)), which continued the pattern of division, then laid the foundations for the present system. It created the Federal Aviation Agency ("FAA") with regulating and enforcing functions, while retaining the Civil Aeronautics Board ("CAB") as an autonomous entity responsible for economic regulation, accident investigation, and appellate review of FAA actions to suspend or revoke certificates. *See* 49 U.S.C. app. 1429 (1982). Under this bifurcated structure, the FAA had authority to compromise civil money penalties for violations of any of the provisions of the Federal Aviation Act of 1958 or rules promulgated thereunder that the FAA was responsible for administering, whereas the CAB had authority to compromise civil money penalties only for violations of provisions and rules that

At the risk of some oversimplification, the Federal Aviation Administration, which is located within the Department of Transportation, is the agency charged with substantive regulatory authority and with enforcement responsibility under the Federal Aviation Act. It promulgates regulations to promote aviation safety,[13] conducts investigations to ensure compliance and discover noncompliance,[14] and brings enforcement actions.[15]

In contrast with the FAA's general mandate, the NTSB, which is an independent agency,[16] has two relatively discrete functions in the area of aviation safety: those of investigating accidents and issuing air safety

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involved accident investigations. *See* Federal Aviation Act of 1958, sec. 901, 72 stat. 731, 783 (codified at 49 U.S.C. app. 1471(a)). The Act of October __, 1958, Pub. L. No. 87-528, 76 stat. 143 (1962) (codified in scattered sections of 49 U.S.C.), which amended the Federal Aviation Act of 1958, ended the disparity between the FAA's and the CAB's civil-penalty powers by authorizing the CAB to compromise civil money penalties for violations of provisions and rules that involved economic regulations. *See* Act of October __, 1958, sec. 901(a), 76 stat. 143, 149 (codified at 49 U.S.C. 1471(a)).

Continuing the saga, the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified at 49 U.S.C. app. 1651-59 (1982)), inserted the FAA (now renamed as the Federal Aviation Administration) into the newly created DOT. The CAB retained its economic regulatory functions, as well as its power to compromise penalties for violations of economic provisions and rules. But its accident-investigation and appellate responsibilities, as well as its power to compromise penalties for violations of accident-investigation provisions and rules, were vested in the National Transportation Safety Board, which was intended to be functionally independent from the outset and was given formally independent status by the Independent Safety Board Act of 1974, Pub. L. No. 93-633, tit. III, 88 Stat. 2166 (1975) (codified at 49 U.S.C. 1901-07 (1982 & Supp. V 1987)). As discussed below, the FAA and the NTSB are the two entities with continuing authority in the area. Finally, the Airline Deregulation Act, Pub.L. 95-504, 92 stat. 1741 (1978) (codified in scattered sections of 49 U.S.C.), which restructured the CAB and provided for its gradual extinction, gave the CAB, and the DOT as its successor agency for this purpose, the power to impose civil money penalties for violations of economic regulations. *See* 49 U.S.C. app. 1471(a) (1982 & Supp. V 1987). Consistent with Congress's patchwork treatment of the regulating agencies, however, the FAA's powers involving civil money penalties for violations of aviation safety regulations were not similarly enhanced at this time. As matters currently stand, the FAA and the NTSB are the two entities with continuing authority in the area of aviation safety that is the subject of this report.

[13] *See, e.g.*, 49 U.S.C. app. 1348, 1421 (1982 & Supp. V 1987).

[14] *See, e.g.*, 49 U.S.C. app. 1425, 1429 (1982 & Supp. V 1987).

[15] *See, e.g.*, 49 U.S.C. app. 1471, 1475 (1982 & Supp. V 1987).

[16] *See* 49 U.S.C. app. 1901-02 (1982).

recommendations.[17] In addition, and much more significant for purposes of this report, the NTSB has adjudicative responsibilities in an important category of cases involving alleged violations of the Federal Aviation Act and the implementing regulations issued by the FAA.[18]

A. General Structure of Aviation Regulation and Enforcement

1. The FAA

Under the Federal Aviation Act, the FAA is charged with responsibility to lay down air traffic rules;[19] set minimum standards governing aircraft design, construction, and maintenance;[20] dictate maximum periods of service for pilots and crews;[21] impose various record-keeping requirements; and generally provide for safety in air commerce.[22] To ensure compliance with applicable regulations, FAA personnel conduct inspections and, as will be discussed shortly,[23] initiate enforcement actions.[24] In addition, the FAA has licensing powers and responsibilities[25] with respect to "almost every conceivable form of aviation business" and function.[26] Pilots, flight personnel, and many aircraft mechanics also require certificates.[27]

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[17] *See* 49 U.S.C. app. 1441(a) (1982).

[18] *See* 49 U.S.C. app. 1903(a)(9) (1982 & Supp. V 1987); *see also* 49 U.S.C. app. 1422(b), 1429(a) (1982 & Supp. V 1987).

[19] *See* 49 U.S.C. app. 1348, 1421 (1982 & Supp. V 1987).

[20] *See* 49 U.S.C. app. 1421(a)(1) (1982).

[21] 49 U.S.C. app. 1421(a)(5) (1982 & Supp. V 1987).

[22] *See, e.g.*, 49 U.S.C. app. 1348, 1421 (1982 & Supp. V 1987).

[23] *See infra* notes 30-63 and accompanying text.

[24] *See* 49 U.S.C. app. 1425, 1429, 1471, 1475 (1982 & Supp. V 1987).

[25] *See* 49 U.S.C. app. 1421-29 (1982 & Supp. V 1987).

Unlike many administrative agencies, however, the FAA has historically lacked a general grant of authority to impose civil sanctions for violations of the statute and regulations that it is charged with administering. The Federal Aviation Act provides two main forms of civil sanction: (i) suspensions or revocations of existing licenses (so-called "certificate actions")[28] and (ii) civil money penalties.[29] Historically, the FAA's power with respect to these sanctions has been more to seek than to impose. A curious feature of the Federal Aviation Act is that it has provided, and indeed continues to provide, starkly different adjudicatory structures in certificate actions on the one hand and actions for civil money penalties on the other.

2. Penalties

a. Certificate suspensions and revocations

According to FAA policy, certificate actions are the "primary" enforcement tool in cases involving certificate holders other than airline companies--pilots, flight personnel, and mechanics, for example.[30] Aiming to ensure compliance with safety regulations, the agency reasons that, "if a certificate holder improperly exercises the privileges of that certificate, the natural consequence ... is to lose the privileges for a period of time commensurate with the violation."[31] There are four main exceptions to the agency's preference for certificate action as the most appropriate form of sanction. One deals with persons who are not certificate holders--for example, passengers.[32] Another involves relatively minor violations, "where the adverse consequences of a certificate action would be clearly disproportionate to the violation."[33] A third and differently rationalized exception applies to air carriers, and especially to airlines providing scheduled passenger service, in whose case a certificate action might entail "a substantial adverse impact on the public from disrupted service."[34] Finally, the agency sometimes seeks civil money penalties in cases in which a certificate action would be untimely under applicable procedural rules.[35]

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[26] Hamilton, *supra* note 11, at 616-17: "The FAA certifies almost every conceivable form of aviation business, including domestic, flag, and supplemental air carriers and commercial operators of large aircraft, air travel clubs using large airplanes, scheduled air carriers using helicopters, foreign air carriers operating within the United States, operators of helicopters hoisting loads externally, air taxi and commercial operators of small aircraft, agricultural aircraft operators, airports serving certificated air carriers, pilot training schools, aircraft repair stations, aviation maintenance technician schools, and parachute lofts, along with both ground and flight instructors. In addition to obtaining an operating certificate, each flight crew member and air traffic controller must obtain an aviation medical certificate from the FAA."

[27] See 49 U.S.C. app. 1422 (1982 & Supp. V 1987).

[28] See 49 U.S.C. app. 1429 (1982). Certificate actions are often referred to as "section 609 cases," in reference to section 609 of the Civil Aeronautics Act of 1938.

[29] *See* 49 U.S.C. app. 1471 (1982 & Supp. V 1987). Suits for civil money penalties are often referred to as "section 901 cases," in reference to section 901 of the Civil Aeronautics Act of 1938.

[30] *See* U.S. Department of Transportation, Federal Aviation Administration, Compliance and Enforcement Program, Order No. 2150.3A (hereinafter cited as "FAA Enforcement Handbook"), par 206 (1988).

The FAA Administrator[36] has long had power to amend, modify, suspend, or revoke existing certificates.[37] But that power, as a practical matter, requires the concurrence of the National Transportation Safety Board. If the Administrator issues an order affecting a certificate, the holder has a right of appeal to the NTSB,[38] which is directed by statute to conduct an independent review.[39] Under NTSB rules, the initial decision is made by an ALJ, and a further appeal may be taken to the Board itself.[40] If the Board's decision is adverse to the certificate holder, the certificate holder may obtain judicial review in the federal courts of appeals.[41]

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[31] *Id.*

[32] *See id.*

[33] *Id.*

[34] *Id.*

[35] The NTSB, which adjudicates certificate actions, has a "stale complaint rule" under which it regards as untimely any penalty action not initiated within six months of the alleged violation. See 49 CFR 821.33 (1988).

[36] Within the current statutory framework, the Administrator possesses suspension and revocation powers on behalf of the Secretary of Transportation under 49 U.S.C. sec. 106(g) (1982 & Supp. V 1987).

[37] *See* 49 U.S.C. app. 1429 (1982). The FAA's authority to suspend and revoke certificates for punitive purposes has been challenged repeatedly by former FAA attorney Lawrence Smith. *See, e.g.*, Smith, FAA Punitive Certificate Sanctions, 14 Transportation L.J. 59 (1985). The essence of Smith's argument is that the FAA began to assert the power to use certificate actions for punitive purposes under the 1926 Air Commerce Act, but that Congress did not intend to grant this authority in 1926, and that the FAA's initial arrogation of unlawful power remains illegitimate. But this argument has been repeatedly rejected by the courts. *See, e.g.*, Komjathy v. NTSB, 832 F.2d 1294 (D.C. Cir. 1987); Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986). Even if Smith were correct about the 1926 Act, it seems clear that Congress, in subsequent Acts, has intended to ratify the use of certificate actions for punitive purposes. And its intent is legally controlling. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 581-82 (1978) (Congress is presumed to be aware of administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts that statute or incorporates relevant parts in a new law).

[38] *See* 49 U.S.C. app. 1429(a) (1982).

[39] *See id.* "The National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air

In the context of general administrative practice, two features of the process for taking certificate actions stand out. First, imposition of this form of sanction follows what is sometimes called a "split enforcement" model.[42] Whereas many administrative agencies are able to adjudicate violations of their own rules, in certificate action cases there is a division of powers. The FAA promulgates rules and brings actions to enforce them, but the NTSB, in every disputed case, exercises independent adjudicatory authority. Second, certificate suspensions and revocations are nevertheless imposed administratively, without requirement of prosecution by a United States attorney or trial by jury. Review in the courts of appeals occurs on the administrative record, subject to substantial evidence review.[43]

b. Civil money penalties

(i) Pre-1987 scheme

Civil money penalties have long been available under 49 U.S.C. app. sec. 1471, and, as noted above,[44] are the FAA's preferred form of sanction against

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transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of hearings the National Transportation Safety Board shall not be bound by the findings of fact of the Administrator."

[40] 49 CFR 821.47 (1988); *see* 49 U.S.C. app. 1429(a) (1982). A case that is appealed to the full Board is routinely transferred to the Office of the General Counsel, where it is assigned to a staff attorney. Telephone interview with NTSB staff attorney Ronald Battochi of Jan. 31, 1990. The staff attorney then prepares a draft decision, which is circulated to all five Board members with the relevant briefs attached. Also attached is a voting sheet, on which members record their votes. Roughly 90% of the Board's cases are decided through this voting process. *Id.* At the request of any member, however, a case will be "calendared for discussion" at a closed meeting of the Board, at which only members and staff are present. *Id.* This type of deliberation occurs in perhaps 10% of all decided cases. *Id.* Although the Board's rules permit oral argument at the discretion of the Board, requests for oral argument are almost never granted. *Id.*

[41] 49 U.S.C. app. 1429(a) (1982). In cases of NTSB decisions that are adverse to the FAA, the agency has no right of appeal. *See id.*; 49 U.S.C. app. 1486 (1982).

[42] *See* Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 Ad. L. Rev. 315 (1987) (using the term to apply to administrative structures in which one agency has responsibility for rulemaking and enforcement and another for adjudication).

[43] 49 U.S.C. app. 1486(e) (1982).

[44] *See supra* notes 32-35 and accompanying text.

persons who do not hold certificates, against air carriers, and against violators for whom a certificate suspension or revocation would be excessive. But the relevant statutes--prior to the authorization of the Demonstration Program--generally made no provision for the administrative assessment of civil money penalties.[45] Under the procedures then in place, the agency would conduct an investigation, issue a letter proposing a civil penalty, and afford an opportunity for an informal conference presided over by an FAA attorney.[46] But the Administrator's only legal authority, after concluding that a violation had occurred, was to "compromise" a penalty.[47] If the party charged with a violation declined either to pay the proposed penalty or to enter a compromise that the FAA deemed acceptable, the FAA was forced to refer the action to a U.S. attorney for enforcement action in a federal district court, where the defendant would enjoy a right to trial by jury.[48] There was no provision for administrative adjudication by the NTSB or any other agency. The maximum available civil penalty was $1,000.[49]

(ii) Pressures for change

By 1987, the statutory provisions for civil money penalties had emerged as a subject of controversy and a source of frustration. Appealing to the ultimate concern of aviation safety, the FAA argued that allowing civil money penalties to be imposed only after a suit in federal district court by a U.S. attorney undermined the sanctions' deterrent effect. According to the agency, the enforcement process operated too slowly to drive home the message that violations would lead to punitive consequences.[50] Moreover, the FAA argued, the reluctance of U.S. attorneys to prosecute cases for relatively small penalties put undue pressure on the agency to compromise civil penalty assessments, with a further diminution in deterrent effect.[51] In a closely related complaint, the FAA argued that the maximum civil penalty of $1,000, which had remained unchanged since 1938, was too low. According to the FAA, a penalty limited to this amount "provided little economic disincentive to any commercial operator capable of viewing the penalty as merely a cost of doing business."[52]

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[45] There was an exception for cases involving violations of the Hazardous Materials Transportation Act, 49 U.S.C. app. 1801-13 (1982 and Supp. V 1987). In Hazardous Materials cases, the Administrator (for the Secretary) has been able to "assess" a civil money penalty "after notice and opportunity for hearing" with no provision for review by the NTSB. *See* 49 U.S.C. app. 1809 (1982). The Administrator's decision may be appealed to the courts of appeals. *See* 49 U.S.C. app. 1486(a) (1982). As with decisions made by the NTSB, the Administrator's decision is subject to "substantial evidence review." 49 U.S.C. app. 1486(e) (1982).

[46] *See Pangia, Handling FAA Enforcement Proceedings: A View from the Inside*, 46 J. Air L. & Comm. 573, 593-94 (1981).

[47] 49 U.S.C. app. 1471(a)(2) (1982 & Supp. V 1987).

[48] *See* 49 U.S.C. app. 1487(b) (1982).

[49] *See* 49 U.S.C. app. 1471(a)(1) (1982).

[50] For a rehearsal of a similar argument made by the FAA in 1971, and an endorsement of that argument's validity, *see* Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, 2 Recommendations and Reports of the Administrative Conference of the United States 896, 923 (1972).

Viewing the matter from a different perspective, at least some private aviation lawyers expressed concern that the overall structure for imposition of sanctions was perverse and dysfunctional.[53] It was administratively easier for the FAA to pursue certificate actions, with their potentially draconian penalties, than to seek modest civil fines. In addition, the disparate enforcement tracks--with civil penalty cases in the federal district courts and certificate actions adjudicated administratively before the NTSB--invited forum shopping.

(iii) Current provisions: the Demonstration Program

The Airport and Airway Safety and Capacity Expansion Act of 1987[54] ("1987 Act") significantly altered the preexisting scheme for the imposition of civil money penalties--though only on a provisional basis. Specifically, the 1987 Act authorized a two-year Civil Penalty Assessment Demonstration Program, under which the FAA Administrator may assess civil money penalties with a cumulative total of up to $50,000.[55] Before a disputed penalty can be imposed, the statute contemplates a formal administrative hearing before an ALJ within the Department of Transportation, the FAA's parent agency, and administrative review by the FAA Administrator.[56] Civil penalty defendants also have a right of judicial review in the courts of appeals.[57] In addition to providing for administrative adjudication, the 1987 Act increased the maximum civil penalty for any single violation from $1,000 to $10,000 for any person who operates an aircraft for compensation or hire in violation of applicable federal statutes or regulations.[58]

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[51] For a survey and argument to the same general conclusion, *see id.* at 919-23.

[52] FAA Report to Congress, *supra* note 9, at 3.

[53] *See, e.g.*, Smith, *supra* note 37, at 63-65.

[54] Pub. L. No. 100-223, 101 Stat. 1486 (1987).

[55] *See* 49 U.S.C. app. 1475 (1982 & Supp. V 1987).

[56] *See id.*

[57] 49 U.S.C. app. 1486(e) (1982); see 14 CFR 13.235 (1989).

[58] 49 U.S.C. app. 1471(a) (1982 & Supp. V 1987).

c. Other forms of sanction

Besides certificate actions and suits for civil money penalties in the federal district courts, the statutory scheme that existed in 1987 and that exists today includes sundry provisions for other, but practically less important, civil remedies for violations of statutes and regulations relating to aviation safety. In emergency cases, the statutes generally allow summary action by the FAA Administrator, with a subsequent right of both administrative and judicial review.[59] Injunctive remedies require judicial action.[60] And in one relatively small but not insignificant category of cases, arising under the Hazardous Materials Act, the statutes permit the administrative imposition of civil money penalties without a requirement of review by the independent NTSB.[61] Following a notice of proposed penalty, respondents are entitled to a formal hearing before an ALJ within the FAA's parent agency, the DOT, with a right to administrative review by the FAA administrator,[62] and to judicial review in the courts of appeals.[63]

B. Significance of the Demonstration Program

The significance of the legislation creating the Demonstration Program--the Airport and Airway Safety and Capacity Expansion Act of 1987[64]--can be measured in part by its effect on the prior structure for the assessment of civil penalties for violations of air safety regulations. Of largest importance, the statute freed the FAA from reliance on the unwieldy process of referring civil money penalty cases to U.S. attorneys. The legislation also authorized fines large enough to function as effective deterrents.

At the same time, however, the 1987 Act made no attempt to impose any overall coherence or order on the scheme of available remedies for violations of air safety legislation and regulations. That scheme, by 1987, was a complex patchwork that involved partial reliances on a variety of procedural schemes and their diverse bodies of procedural rules. It had grown up largely as the

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[59] *See* 49 U.S.C. app. 1429(a), 1485(a) (1982).

[60] *See* 49 U.S.C. app. 1487(a) (1982).

[61] *See* 49 U.S.C. app. 1471(a)(1) and 1809(a) (1982 & Supp. V 1987).

[62] *See* 14 CFR 13.233 (1989).

[63] *See* 49 U.S.C. app. 1486(a) (1982); 14 CFR 13.235 (1989).

[64] Pub. L. No. 100-223, 101 stat. 1486 (1987).

result of historical accident, and it could have been to no one's liking.[65] Reforming just one segment of the crazy-quilt, the 1987 legislation contemplated that the principal forms of sanction for violations of air safety regulations--certificate actions and suits for civil money penalties--would continue to follow sharply distinct procedural tracks. Adjudicatory responsibility in certificate cases remained with the NTSB, while adjudication in civil money actions was assigned to officials of the FAA and its parent, the DOT.

A final element of the 1987 authorizing legislation deserves mention. In civil money penalty cases initiated prior to the Demonstration Program, the FAA had routinely entered "compromise" agreements that entailed payment of a fine but no formal finding of guilt.[66] The FAA has construed the 1987 legislation as precluding compromises of this kind in Demonstration Program cases.[67] Although the agency remains willing to compromise the amount of proposed civil penalties, it construes the statute authorizing the Demonstration Program as requiring a "finding of violation" as a condition of its accepting a fine in settlement of a case.[68] From the perspective of those subject to fines for violations of the federal aviation regulations, this change in compromise policy may be a significant one, due to the repercussions that may attend a formal finding. Air carriers may suffer a damaging loss of reputation among the public; in the relatively unusual cases in which the FAA seeks a civil money penalty from an individual pilot or other individual certificate holder, the affected individuals may find it harder to get and retain aviation-related jobs.[69] Moreover, if the changed policy reduces the incentive to compromise, an increased demand for formal adjudication must be anticipated.[70]

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[65] *See generally* Tello, Do We Need So Many Enforcement Structures and Rules for Aviation Enforcement?, Translaw (Winter 1989 ed.).

[66] No precisely accurate figure is available, due to the nature of the FAA's record-keeping categories. But of the 6,157 cases in which the FAA collected civil money penalties (including 104 hazardous materials cases) from 1984 through 1988, only 615 were closed following reference to a U.S. attorney. *See* letter from Greg Walden to author, March 7, 1990. The remainder (except for the 104 hazardous materials cases that were resolved under a separate grant of statutory authority, *see* fn. 2, *supra*.) were all closed through a compromise procedure.

The above information, as well as most of the statistical information in this report, was provided to me by the FAA. This information came in various installments; earlier sets of figures were later updated. But the most comprehensive and most up-to-date information was sent to me in a package labeled "Requested Statistics" by Mary Walsh, Staff Attorney, FAA Enforcement Policy Branch, Regulations and Enforcement Division, on December 20, 1989. This set of statistics and computer print-outs most importantly reflects the number and status of Demonstration Program cases as of October 31, 1989--a date at which the Demonstration Program had been in operation for 14 months. These "Requested Statistics" will hereinafter be cited as "Demonstration Program Statistics of October 31, 1989."

[67] *See* Federal Aviation Administration, Disposition of Comments on Rules of Practice for FAA Civil Penalty Cases (*hereinafter* "FAA Disposition of Comments"), 54 Fed. Reg. 11,914, 11,916 (March 22, 1989).

[68] *See id*. For a further discussion of this issue, *see* infra notes 172-188 and accompanying text.

II. The Demonstration Program in Operation

The Demonstration Program, which is the principal focus of this report, has now been in operation since September 1988. This Part provides a general overview of the program and its controversial history.

A. Implementation

Before adjudication of civil money penalty cases could occur within the FAA and the DOT, the FAA needed to promulgate rules of practice. Although the Demonstration Program was initially authorized for a period of only two years, from December 30, 1987 until December 30, 1989, it took the FAA over eight months to issue a set of procedural rules. With the Demonstration period fleeting, the FAA, at the end of its drafting process, opted to issue a final rule, without providing prior notice or opportunity for comment, on August 31, 1988.[71] The agency invited comment at that time. After comments had been received, the FAA published a response on March 22, 1989, in which it defended each of the challenged procedural provisions and rejected all suggestions for amendment.[72]

B. Numbers and Types of Cases

Although the Demonstration Program has now been in effect for more than 16 months, many of the data that would be most relevant to an assessment are not yet available. But a few generalizations are possible. Five may be of particular pertinence.

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[69] *See* Brief of Intervenors National Air Carrier Association, Inc., *et al.*, in No. 89-1195, *Air Transport Association of America v. Department of Transportation, et al.* (D.C. Cir.) (hereinafter cited as "Intervenors' Brief"), at 10.

[70] *See id.*

[71] *See* 53 Fed. Reg. 34,646 (Sept. 7, 1988).

[72] *See* FAA Disposition of Comments, *supra* note 67.

First, the total number of civil money penalty cases initiated under the Program is quite large. During the first 14 months of the Program's operation, the FAA issued 4,379 notices of proposed civil penalty in cases subject to administrative adjudication.[73] By contrast, the FAA initiated only 53 actions for civil money penalties that exceeded the Program's $50,000 ceiling during the same period.[74]

Second, the vast preponderance of Demonstration Program cases fall within three identifiable categories. (i) More than 65% of the cases (2,871) involve security violations.[75] These arise overwhelmingly, if not exclusively, out of the operation of screening processes aimed at detecting illegal weapons.[76] The security cases divide into two types: cases against passengers, who unlawfully attempt to introduce guns or other weapons onto aircraft, and cases against air carriers that fail to detect simulated weapons in tests conducted by the FAA. (ii) About 15% of the Demonstration Program cases (649) have involved flight operations violations[77]--violations of aircraft operational rules, such as those that forbid dispatching an aircraft without required equipment on board, and those that regulate behavior by passengers. (iii) Roughly 10% of notices of proposed civil penalty (456) allege violations of regulations that prescribe maintenance standards and procedures.[78]

Third, the vast majority of Demonstration Program cases have been brought against either airline companies or against individuals who are not certificate holders.[79] This is partly the result of the FAA's substantive enforcement priorities, which have put a heavy emphasis on security violations, and especially on test-object screening.[80] But the pattern is also a result of the FAA's longstanding criteria for the selection of sanctions, which make certificate actions the preferred remedial choice against individual certificate holders.[81] Air carriers are more often the targets of fines, because a suspension of their certificates could severely inconvenience the traveling public. The major air carriers, much more than any other identifiable group, have also tended to receive large fines. Out of roughly the first 600 cases in which the FAA sought the new maximum $10,000 penalty for a single violation of applicable rules, 483 involved a major carrier's failure to detect a simulated weapon.[82]

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[73] *See* Demonstration Program Statistics of Oct. 31, 1989, *supra* note 66.

[74] *See* FAA Statistics supplied to me on February 22, 1990. In the 53 cases involving requests for civil penalties in excess of $50,000, the FAA sought penalties totaling roughly $16 million. *See id.* The data supplied to me by the FAA do not indicate the total dollar amount sought in the 4,379 Demonstration Program cases. It may be possible to get a (very) rough measure, however, by taking the average penalty in cases in which orders assessing civil penalties have issued--which is $1936, *see* Demonstration Program Statistics of October 31, 1989, *supra* note 66--and projecting it over 4,379 cases. This crude method of estimation suggests that the FAA sought on the order of $8.5 million in civil money penalties in Demonstration Program cases during the Program's first 14 months. When the figures are put together, they suggest that the Demonstration Program cases constituted nearly 99% of the FAA's total number of civil money penalty actions, but that more than 60% of the total fines that the FAA sought to collect during the same period were sought outside the Program's ambit.

[75] *See id.*

[76] Interview with John Cassady, Deputy Chief Counsel, FAA, of January 11, 1990.

[77] *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66.

[78] *See id.* The FAA also reports 97 records and reporting violations, 55 medical violations, and 53 "crewmember interference" violations. *See id.*

Fourth, once a case has come through the administrative process to a point where it is ready for adjudication, the structure established under the Demonstration Program operates with reasonable expedition. Of the 368 Demonstration Program cases in which formal administrative hearings had been scheduled or held as of October 31, 1989, there was an average elapsed time of 183 days between a hearing's being requested and a hearing's being scheduled.[83] Most of the hearings ended with a dispositive oral decision.

But fifth, there is, within the administrative system in which the Demonstration Program operates, a disturbingly large backlog of cases whose status the FAA is unable to account for. Out of the nearly 4,400 cases initiated during the program's first 14 months, only 368 formal hearings had been requested as of October 31, 1989, and only 1,224 cases had proceeded to an "order assessing civil penalty"--an administrative finding of liability--as a result of formal hearings, settlements, or defaults.[84] There are roughly 2,800 "open" cases in which notices of civil penalty were issued, but in which hearings have not been requested and orders assessing civil penalty have not been entered.[85] There is no firm indication of the speed at which these cases will proceed through the administrative system, or of how many will ultimately require formal hearings before an ALJ.

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[79] The statistics that directly support this conclusion come from the admittedly restricted sample of 368 cases in which formal hearings had been requested as of October 31, 1989. Of the 286 security cases included in this sample, 132 involved air carriers and 148 were "gun cases" against individuals. *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66. The 54 "operations cases" included 29 against "carriers, air taxi operators, airports, or other entities" and 25 against "passengers or other individuals." *Id.* Only within the category of "maintenance cases," where there were nine "cases against carriers or other entities" and "16 cases against individuals (*e.g.*, mechanics)," *id.*, is there any significant representation of actions against certificate holders.

[80] *See* note 9 *supra*.

[81] *See supra* notes 32-35 and accompanying text.

[82] FAA Report to Congress, *supra* note 9, at 6-7.

[83] *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66.

[84] *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66.

C. Responses to the Demonstration Program

Although the administrative imposition of civil money penalties is now a familiar practice in other contexts,[86] the Demonstration Program has proved fiercely controversial. There appear to be at least four related reasons why this is so.

First, during the period of the Demonstration Program, the FAA has pursued controversial and aggressive substantive enforcement policies that have produced a large percentage of the civil penalty cases subject to administrative adjudication. Most easily documented is the FAA's aggressive testing of air carriers' capacity to detect simulated weapons at preboarding passenger screening points.[87] The major carriers' resentment of the simulated weapons program, which has produced adverse publicity and which they claim is politically motivated and substantively unfair,[88] seems to have heightened their hostility to the Demonstration Program's procedural elements.[89] There also seems to be a sense in the general aviation community, going far beyond the major carriers, that the FAA in recent years has adopted a "get-tough" enforcement stance, and that its enforcement personnel have sometimes adopted unreasonably harsh attitudes.[90] The resulting resentment also seems to have manifest itself in opposition to the Demonstration Program.

Second, and in some ways relatedly, the FAA's issuance of its final rules of practice without notice or opportunity for prior comment appears to have fed the sense of at least some segments of the aviation community that the agency is insensitive to perspectives other than its own. The agency's legal arguments in defense of its course,[91] however persuasive in their own terms, have done little to ameliorate this concern.

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[85] This conclusion, which emerges from an examination of Demonstration Program statistics, was corroborated by John Cassady, Deputy Chief Counsel of the FAA, in a telephone conversation of Dec. 18, 1989.

[86] *See* Diver, *supra* note 1.

[87] *See supra* notes 9 and 80-82 and accompanying text.

[88] *See supra* note 9.

[89] *See id.*

[90] *See, e.g.*, Lewis, FAA Enforcement: An Agency Under Fire, 63 Business and Commercial Aviation (Dec., 1988) (quoting complaints that the FAA is taking an increasingly adversarial enforcement attitude and that it is dealing especially harshly with "little guys" who lack the resources to defend themselves effectively in litigation).

Third, the rules of practice promulgated by the FAA offered an easy target for substantive criticism. In certain identifiable respects, those rules afford fewer procedural safeguards to civil penalty defendants than do what one administrative law judge, in private conversation, has called the "tried and true" system of NTSB rules.[92] Adverse comments on the FAA's procedural rules have come, not only from the regulated aviation community, but from the Section of Administrative Law and Regulatory Practice of the American Bar Association.[93]

Finally, as an additional element in the volatile mix, the aviation community had grown accustomed to "independent" adjudication of alleged safety violations--either by the federal district courts in suits for civil money penalties or by the NTSB and its predecessor agencies in certificate actions.[94] The result may have been a natural disposition to assume that adjudicative fairness requires complete adjudicative independence--something that the Demonstration Program, which involves administrative adjudication by ALJs in the FAA's parent agency and administrative review by the FAA Administrator himself, does not provide.

D. Challenges to the Demonstration Program

The widespread hostility to the Demonstration Program manifested itself in both judicial and legislative forums. The Air Transport Association of America ("ATA"), representing the major airlines, brought an action in the United States Court of Appeals for the District of Columbia Circuit to enjoin application of the rules of practice promulgated by the FAA.[95] The ATA contends that the FAA's rules of practice are unlawful because promulgated without opportunity for prior public comment; it also raises a number of more specific objections, both statutory and constitutional, to the fairness of individual provisions.[96] The case was argued on February 2, 1990.[97]

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[91] It has argued the rules of practice are "rules of agency organization, procedure, or practice" that are specifically exempted from a public notice requirement by APA section 553(b)(3)(A). In addition, it has argued that the shortage of time within the Demonstration Program's two-year lifespan constitutes "good cause" for its holding a notice and comment procedure to be impracticable under section 553(b)(3)(B). *See* FAA Disposition of Comments, *supra* note 67, at 11,914.

[92] For a discussion of the FAA's rules of practice, *see* Section V below.

[93] *See* Letter of Sally Katzen, Chair, Section of Administrative Law and Regulatory Practice of the American Bar Association to the Federal Aviation Administration, Office of Chief Counsel ("Katzen letter") (December 2, 1988).

[94] One or another variant of a split enforcement model, in which one agency adjudicates cases brought by another agency, has been followed in certificate actions since 1940. *See* note 12 *supra*.

With the Demonstration Program due to expire on December 31, 1989, opponents also carried their complaints to Congress. The most public debate in the legislative forum occurred on November 15, 1989, in a hearing before the Subcommittee on Aviation of the House Public Works and Transportation Committee. Representatives of virtually all segments of the aviation community attacked the rules of practice promulgated by the FAA and opposed continuation of the Demonstration Program as implemented by the FAA and its parent agency, the DOT. Several witnesses said explicitly that they would support administrative imposition of civil money penalties by the NTSB, pursuant to its rules of practice.[98] The FAA's refusal to compromise civil money cases without a formal finding of guilt was also attacked by several witnesses as unduly harsh.[99]

With the Demonstration Program scheduled to expire on December 30, 1989, and with no preexisting legislative provision for the disposition of pending cases if the program were allowed to lapse, Congress elected to authorize a stop-gap, four-month extension of the Demonstration Program and its system of administrative adjudication until April 30, 1990.[100] Before deciding whether to extend, terminate, or modify the program, Congress is awaiting more advice and information, including the recommendations of the Administrative Conference of the United States.[101]

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[95] No. 89-1195, *Air Transport Association of America v. Dept. of Transportation*, et al. (D.C. Cir.). The ATA has been joined by a collection of intervenors including the National Air Carrier Association, the Airline Pilots Association, and the Aircraft Owners and Pilots Association.

[96] *See* Brief of Petitioner Air Transport Association of America in No. 89-1195, *Air Transport Association of America v. Dept. of Transportation, et al.* (D.C. Cir.) (*hereinafter* "ATA Brief").

[97] The most discussed issue in the oral argument was whether the FAA's rules of practice qualified as "rules of agency ... procedure" that are exempted from otherwise applicable notice-and-comment requirements by APA section 553(b)(3). In particular, the judges' questions reflected an interest in how the standard for identifying exempt "rules of ... procedure" that was employed in Reeder v. FCC, 865 F.2d 1298, 1305 (D.C. Cir. 1989), would apply to the FAA's rules of practice. For a discussion of this issue, *see infra* notes 215-23 and accompanying text. Perhaps the second most discussed issue was whether substantive challenges to the rules' lawfulness, which are founded both on the Constitution and the APA, are "ripe" for judicial review in a preenforcement challenge.

[98] *See, e.g.*, Prepared Statement of John Yodice, General Counsel, Aircraft Owners and Pilots Association.

[99] *See, e.g.*, *id.*; Prepared Statement of James W. Johnson, Attorney, Air Line Pilots Association, International.

III. The Desirability of Administrative Imposition of Civil Money Penalties

Although administrative assessment of certain kinds of penalties has long been accepted, administrative imposition of civil money penalties has sometimes been regarded as peculiarly problematic. This section begins with an analysis of the constitutionality of the administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing safety regulations. It then discusses considerations of administrative policy.

A. Constitutional Issues

Perhaps because money fines are familiar as a criminal sanction, courts once were reluctant to acknowledge that agencies could impose this form of penalty.[102] And constitutional questions have continued to linger, despite an overwhelming pattern of administrative practice: as long ago as 1979, over forty percent (40%) of the 348 federal statutes prescribing civil money penalties also provided for administrative assessment.[103] Today, there should be little doubt about the constitutionality of administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing regulations. Within the categories established by recent Supreme Court cases, however, it is much easier to conclude that this is so than to state why.

Doubts about the constitutionality of administrative imposition of civil money penalties derive from two constitutional provisions: article III, which prescribes that "the judicial Power of the United States shall be vested" in courts whose judges enjoy life tenure,[104] and the seventh amendment, which states that, "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[105] There are two interpretive problems under article III. First, which categories of cases must, if they are to be vested in any federal tribunal at all, be vested in an article III court staffed by life-tenured judges?[106] Second, when is appellate review or supervisory responsibility by an article III tribunal sufficient to legitimate initial decisionmaking by an adjunct, master, or administrative agency?[107] The seventh amendment issue is largely one about which statutory causes of action, if any, should trigger the right to trial by jury that is prescribed for "Suits at common law."[108]

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[100] *See supra* note 5 and accompanying text.

[101] *See* H.R. Rep. No. 101-371, 101st Cong., 1st Sess., Extension of Civil Penalty Demonstration Program.

[102] See, e.g., Lipke v. Lederer, 259 U.S. 557 (1922).

[103] See Diver, *supra* note 1, at 1438, 1441.

The Supreme Court's caselaw, under both provisions, reflects a somewhat uncertain compass. But the Court's recent decision in *Granfinanciera v. Nordberg*[109] makes clear that a central analytical concept, under both article III and the seventh amendment, is the traditional concept of a "public right."[110] This concept is a murky one, especially at its fringes, but it reflects the assumption that there are certain categories of cases--notably including those in which the government is a defendant, but also encompassing disputes in which the government is enforcing a constitutional scheme of federal regulations[111]--to which the ordinary principles governing rights of access to judicial tribunals, for reasons of sovereign necessity and convenience, do not apply.[112] The Court has never settled on an adequate definition of the "public right" concept;[113] there is serious question whether it ever could.

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[104] U.S. Const., art. III, sec. 1.

[105] U.S. Const., amend. VII.

[106] See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 589 (1985).

[107] See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-81 (1982); Crowell v. Benson, 285 U.S. 22, 50-57 (1932); Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988).

[108] See, e.g., Tull v. United States, 481 U.S. 412 (1987); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977).

[109] 109 S.Ct. 2782 (1989).

[110] See id. at 2795-2802. See also Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450-61 (1977).

[111] See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 (1977); Crowell v. Benson, 285 U.S. 22, 50 (1932).

[112] For a history and analysis, see Young, Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor, 35 Buff. L. Rev. 765 (1986).

[113] See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion) ("The distinction between public rights and private rights has not been definitively explained in our precedents.").

Whatever the difficulties of categorization, the "public rights" label, in certain cases where it fits, has a dispositive effect. If a controversy involves a public right, the Court has held that article III establishes no impediment to administrative adjudication.[114] Public rights cases, apparently, are not among those to which article III was intended to apply. Moreover, "if a claim ... asserts a 'public right,' ... then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency."[115]

In light of the Supreme Court's recent pronouncements, virtually all of the difficult issues under both article III and the seventh amendment can, for present purposes, simply be put to one side. If civil enforcement actions under the Federal Aviation Act and its accompanying regulations are public rights cases, there is no article III obstacle to administrative adjudication, and, if an administrative tribunal is used, no seventh amendment bar to administrative imposition of civil money penalties. And the public rights requirement is met. Despite the blurriness of the public rights category, actions to enforce the Federal Aviation Act and its implementing regulations fall within one of the paradigms that is most clearly recognized by Supreme Court precedent: that of a civil suit by the government to protect the public's interest in compliance with a constitutionally valid federal regulatory program.[116]

The conclusion that administrative adjudication in the FAA's civil penalty cases is constitutionally legitimate also accords with the thrust of recent academic commentary. Skeptical of whether the concept of a public right is analytically adequate to bear the weight that the Supreme Court has assigned it, scholars have increasingly argued that judicial review, which is amply provided under the Demonstration Program,[117] should be both necessary and sufficient to legitimate administrative adjudication under article III.[118] There is also strong support for the view that seventh amendment should be held inapplicable to civil actions brought by the government in administrative tribunals to enforce valid statutory schemes of federal regulation.[119]

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[114] See Granfinanciera v. Nordberg, 109 S.Ct. 2782, 2795-97 (1989).

[115] Id. at 2790 n.4; see id. at 2796 ("if Congress may assign the adjudication of a statutory cause of action to a nonArticle III tribunal [as it can in public rights cases], then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder" such as an administrative agency). *Granfinanciera*, in this respect, builds on the foundation laid by a footnote in Tull v. United States, 481 U.S. 412, 418 n.4 (1987). *Tull* held the seventh amendment applicable to a suit by the United States in federal district court to impose a civil money penalty under the Clean Water Act. But the Court, in holding the seventh amendment applicable to that action, distinguished Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1977), on the ground that the government's suit in that case, to enforce civil money penalties under the Occupational Safety and Health Act, had been brought in an administrative tribunal. See 481 U.S. at 418 n.4. According to the *Tull* footnote, "The Court has ... considered the practical limitations of a jury trial" and its functional incompatibility with administrative adjudication "in holding that the Seventh Amendment is not applicable to administrative proceedings."

[116] See Granfinanciera v. Nordberg, 109 S.Ct. 2782, 2797 (1989); Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. at 450.

B. Policy Considerations

Considerations of public policy strongly support the administrative imposition of civil money penalties as a sanction for the violation of regulatory statutes and their implementing regulations. The Administrative Conference so concluded in 1972,[120] and many of its arguments are particularly pertinent in the case of the Federal Aviation Act and its implementing regulations. Civil money penalties are a valuable complement to certificate suspensions and revocations. The latter may be excessively harsh for relatively minor offenses, and might in some cases disrupt airline service on which there is substantial public reliance.[121] Moreover, requiring suits for civil money penalties to be brought by United States attorneys occasioned undue delay and an attendant diminution in the sanction's deterrent effect.[122]

Even if speedier prosecution could be obtained, judicial decisionmaking in all civil money penalty cases would likely have costs that exceed its benefits. The drain on judicial resources could be quite large; a heavy volume of cases should be anticipated.[123] Yet issues of law appear to be relatively rare in actions to enforce the federal aviation regulations. There are also affirmative advantages to be realized from administrative adjudication. An expert, specialized bench should be uniquely able to understand the contexts in which factual questions arise. Moreover, so long as the tribunal is fair, the general aviation community benefits from relatively cheap and informal administrative adjudication. In these circumstances, the values supporting decisionmaking by an article III court are more than amply protected by judicial review.[124]

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[117] See *supra* note 57 and accompanying text.

[118] See, e.g., Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III (forthcoming in the Indiana L.J.); Fallon, *supra* note 107.

[119] See, e.g., F. James & G. Hazard, Civil Procedure sec. 8.11, at 450-51 (3d ed. 1985); J. Friedenthal, M. Kane, & A. Miller, Civil Procedure sec. 11.6, at 500 (1985).

[120] See ACUS Recommendation 72-6, "Civil Money Penalties as a Sanction", 2 Recommendations and Reports of the Administrative Conference of the United States 67-70 (1972), reprinted at 1 CFR 305.72-6. The Administrative Conference reaffirmed its recommendation in 1979. See ACUS Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties", reprinted at 1 CFR 305.79-3.

[121] Cf. ACUS Recommendation 72-6, *supra* note 120 (Recommendation A(2)) ("Civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency--such as license suspension or revocation--whose use may prove (a) Unduly harsh for relatively minor offenses, or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.").

[122] See *supra* notes 50-51 and accompanying text.

In light of considerations such as these, even many members of the aviation community who oppose the Demonstration Program support the general principle that civil money penalties should be imposed administratively.[125] It should therefore come as no surprise that the principal criticisms of the Demonstration Program do not challenge the general case for imposing civil money penalties through an administrative process. This certainly is so with respect to the complaints about the fairness of the FAA's rules of practice. Arguments that the Demonstration Program rules are unfair or unlawful speak only to the question of how a system for the administrative imposition of civil penalties should be structured. They carry no implication that civil money penalties should not be assessed administratively at all.

Nor do charges that the Demonstration Program has failed to produce swifter enforcement in disputed cases[126] undermine the case for a properly structured and implemented program of administrative adjudication. There is, as the Air Transport Association has charged, a growing backlog of enforcement actions awaiting administrative adjudication;[127] and surely the ATA's explanation of why such a backlog would develop possesses intuitive plausibility. The FAA has construed the statute authorizing the Demonstration Program as forbidding it to compromise civil money penalties without an adjudication or admission of culpability;[128] the result is a reduced incentive to pursue settlements, and thus more unresolved cases. But whether or not complaints about the appropriateness of the agency's compromise policy are persuasive, those complaints do not challenge the wisdom of allowing administrative imposition of civil money penalties. Their logical effect, again, is to frame an issue about how a system for the administrative imposition of civil money penalties could best be structured--in particular, about whether, and on what terms, it would permit or encourage compromises.[129]

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[123] See *infra* notes 163-71 and accompanying text (predicting that, of roughly 4,000 annual notices of proposed civil penalty, approximately 1,000 requests for formal hearing ought to be anticipated).

[124] See generally Fallon, *supra* note 107 (arguing that judicial review should be regarded as both necessary and sufficient to protect article III values).

[125] See *supra* note 98 and accompanying text. See also Comments of the Aircraft Owners and Pilots Association on the Federal Aviation Administration's Civil Penalty Assessment Demonstration Program 3 (July 17, 1989).

[126] See ATA Comments, *supra* note 9, at 23.

[127] See id. (claiming that "it took 18 months for FAA to set 35 hearing dates out of 2,900 cases" and that after 18 months of the Demonstration Program, "there was a backlog of 2,000 cases in which nothing had occurred").

[128] See FAA Disposition of Comments, *supra* note 67, at 11,916.

The larger issue of whether there should be administrative adjudication at all is perhaps raised by implication when the ATA argues that "there is no indication that litigation in District Courts would be any less expeditious than FAA administrative hearings."[130] But the data that are currently available, although less than wholly conclusive, support a different conclusion. Although a troublingly large backlog of cases has developed under the Demonstration Program,[131] virtually all of that backlog occurs prior to the point at which a case is ready to proceed to a formal hearing, whether administrative or judicial.[132] And once a case is ready for formal hearing, administrative decisionmaking proceeds more quickly than does adjudication in a federal court.[133]

On the larger question, then, the stronger policy arguments all support administrative adjudication in cases in which the FAA seeks relatively modest civil money penalties. And the most troubling criticisms of the Demonstration Program do not even speak to, much less refute, those arguments. Although important questions of structure remain to be addressed, some form of administrative assessment of civil money penalties ought to be retained.

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[129] That issue is discussed it Part IV, below. Even if the effect of the agency's policy with respect to compromises is to produce a backlog, it is a separate question whether the benefits of that policy outweigh the costs.

[130] See ATA Comments, *supra* note 9, at 23.

[131] See *supra* notes 84-85 and accompanying text.

[132] See *supra* note 83 and accompanying text.

[133] Of the 368 Demonstration Program cases in which formal administrative hearings had been scheduled or held as of October 31, 1989, there was an average elapsed time of 183 days between a hearing's being requested and a hearing's being scheduled. See Demonstration Program Statistics of October 31, 1989, *supra* note 66. Moreover, the FAA's rules of practice contemplate oral decision immediately at a hearing's conclusion in all but unusually complicated cases. See 14 CFR 13.231(c) (1989). It therefore seems reasonable to anticipate that resolution should come, on average, within perhaps 200 days of the request for a hearing. Although there is no precisely analogous figure in cases referred to U.S. attorneys under the prior sanctioning regime, of the 1,223 cases referred to U.S. attorneys between September 7, 1984 and September 6, 1988, those that had been resolved as of July 1989 had taken an average of 306 days following the reference to be resolved; and in the 336 cases that had still not been resolved as of July 1989, an average of 714 days had elapsed since the reference to the U.S. attorney. See FAA Report to Congress, *supra* note 9, at 23-25.

IV. Structuring a System for the Administrative Imposition of Civil Money Penalties

If it is agreed that civil money penalties should be imposed administratively, the next question involves the appropriate forum. In what administrative forum should actions for civil money penalties be prosecuted? There are two plausible candidates: the FAA and its parent DOT, where civil money penalty actions have occurred during the Demonstration Program, and the NTSB, which has long-standing responsibility for the adjudication of certificate actions.

In the political debate over whether to renew the Demonstration Program, the question of the appropriate forum has often been linked to complaints about the specific rules of practice promulgated by the FAA for use in civil penalty cases. For analytical purposes, however, the issue of the appropriate forum is distinct from that of the appropriate procedural rules. This section deals with the forum question. It has two parts. Part A argues that the National Transportation Safety Board is the better forum for adjudication of suits for civil money penalties. Part B discusses statutory changes and administrative arrangements that would be necessary for the NTSB to perform this function in a way that promotes all of the relevant policy concerns.

A. The Appropriate Administrative Forum

The choice of a forum for adjudicating civil money penalty cases should be guided by three main values. The paramount concern is aviation safety. A second important value is that of fairness and its appearance. The tribunal should enjoy and merit trust, both from a public that is concerned about aviation safety and from the aviation community. Finally, there is a closely related set of interests in administrative simplicity, efficiency, and rationality. All of these values support, or at least are consistent with, choice of the NTSB as the more appropriate adjudicator in civil money penalty cases. For reasons of expository convenience, I shall discuss the value of administrative simplicity and rationality first, followed by fairness and its appearance, and then aviation safety.

1. Administrative efficiency and rationality

The current pattern of sharply differentiated enforcement tracks in certificate actions and suits for civil money penalties, with each track possessing its own set of procedural rules, is needlessly complicated and confusing. It would be vastly preferable to have both types of action adjudicated within a single forum under a single set of procedural rules. Having certificate actions before the NTSB and actions for civil money penalties within the DOT poses a risk of conflicting administrative interpretations of the same substantive statutes and regulations. It creates at least a theoretical possibility of forum-shopping by the FAA in its decisions about which sanctions to pursue. It engenders confusion about the applicable procedural rules. And it squanders an opportunity for the consolidation of expertise in one set of ALJs.

As a theoretical matter, the advantages of consolidating certificate actions and suits for money penalties within a single procedural system could be obtained in either of the available forums; either the FAA or the NTSB could be given adjudicatory responsibility in both categories of cases. As a practical matter, however, there is broad agreement that, at least in the short term, it is politically infeasible to transfer certificate actions from the NTSB to the DOT. If the benefits of a substantially unified system of administrative adjudication are to be achieved in the foreseeable future, civil penalty actions must be assigned to the NTSB.

Although reflecting concerns of political practicability, this conclusion does not represent a grudging acceptance of second-best. The NTSB has generally won the trust of those who litigate before it in certificate actions as a fair and efficient tribunal whose effective discharge of its responsibilities ought not to be disrupted.

2. Fairness and the appearance of fairness

Concerns to achieve fairness and the appearance of fairness also furnish strong arguments to rely on the NTSB as an independent adjudicator. The so-called "split enforcement model," in which rulemaking and enforcement responsibility are vested in one agency and adjudicatory power in another, has won acceptance in other contexts as a means of achieving enhanced administrative fairness.[134] That model is especially attractive in the context of

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[134] *See generally* Johnson, *supra* note 42. Outside of the aviation area, there are at least three prominent examples. Under the Occupational Safety and Health Act, 29 U.S.C. 651-78 (1982), an agency in the Department of Labor, the Occupational Safety and Health Administration, sets and enforces safety standards, while challenges are adjudicated by the independent Occupational Safety and Health Review Commission. The Federal Mine Safety and

aviation regulation. On one side, the NTSB, functioning as an adjudicatory body, has acquired a reputation for fairness. On the other, partly as a result of the FAA's substantive enforcement policies and partly as a result of anger at the FAA's administration of the procedural aspects of the Demonstration Program, substantial segments of the aviation community are distrustful of the agency's capacity to adjudicate fairly. However misplaced their trust might be, appearances matter. And it is no disparagement of the FAA to recognize the respect that has been earned by the NTSB.

Although arguments of fairness and its appearance thus support reliance on the NTSB, one drawback of that course deserves mention. Among its functions, the NTSB has the task of investigating all aircraft accidents and, where possible, of determining their probable cause.[135] Frequently, an accident may trigger an enforcement action by the FAA as well as an investigation by the NTSB. In such cases, to assign adjudicatory responsibilities to the NTSB asks the Board to perform the dual function of investigator and impartial adjudicator. As a purely legal matter, the combination of investigative and adjudicative functions in the same officials "does not, without more, constitute a due process violation."[136] Nor, in the case of the NTSB, does it violate the APA.[137] Nonetheless, the possible temptation to prejudgment that might arise from the NTSB's nonadjudicatory responsibilities furnishes a cause for concern.

When this concern is looked at in context, however, it weighs less heavily than the fairness and appearance of fairness arguments in favor of adjudication

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Health Amendments Act of 1977, 30 U.S.C. 801-962 (1982), similarly assigns the task of developing and enforcing standards to the Mine Safety and Health Administration, located in the Department of Labor, but provides for adjudication by the independent Federal Mine Safety and Health Review Commission. A third example grows out of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified as amended in scattered sections of 5 U.S.C.), which abolished the Civil Service Commission. The Commission's place has now been taken by the Office of Personnel Management, which exercises management and administrative functions with respect to the federal civil service, and the independent Merit Systems Protection Board, which exercises judicial authority in disputed personnel cases. See 5 U.S.C. 1205 (1988).

[135] 49 U.S.C. app. 1441 (1982).

[136] Withrow v. Larkin, 421 U.S. 35, 58 (1975). For due process to be offended, "the special facts and circumstances present in the case ... [must indicate] that the risk of unfairness is intolerably high." *Id.* at 58. In the ordinary case in which the NTSB both investigates and subsequently adjudicates, there is no reason to believe that this threshold is crossed. On the contrary, Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962), held specifically that no rights were offended when the Civil Aeronautics Board, which then performed the functions now assigned to the NTSB, adjudicated a certificate appeal growing out of the same set of facts that it had investigated in preparing an accident report.

[137] The section of the APA that deals explicitly with separation-of-functions requirements, 5 U.S.C. sec. 554(d) (1988), does not apply to "members of the body comprising the agency."

by the NTSB. Among the factors supporting this conclusion, similar mixture-of-function concerns would of course arise if the alternative course were chosen and the FAA were asked to combine investigative, prosecutorial, and adjudicative responsibilities in suits for civil money penalties.[138]

3. Aviation safety

The National Transportation Safety Board, fully as much as the FAA, has a mission of promoting aviation safety,[139] and it has compiled a record of adjudicatory decisionmaking that is in no way inconsistent with that mission. Virtually no one argues that aviation safety requires removal of certificate actions--the FAA's preferred form of sanction in cases involving the most serious violations[140]--from the NTSB's traditional jurisdiction. From a safety perspective, if the NTSB is the appropriate adjudicative structure for the generally more serious certificate actions, it could hardly be less so for civil money penalty cases.

The strongest argument that safety considerations call for adjudication by the FAA and its parent agency, the DOT, would probably appeal to the traditional and still most prevalent "model" of administrative practice, under which a single agency performs a mix of investigative, enforcement, and adjudicatory functions.[141] Among its advantages, the traditional model permits policy development through a coordinated blend of regulatory efforts, including both rulemaking and adjudication.[142] It allows agencies to interpret their rules and governing statutes in a way that reflects expert understanding. The traditional model also permits a purposive tailoring of sanctions to the administrator's sense of what is necessary and appropriate in particular cases to achieve a regulatory statute's policy goals.[143] Appealing to the assumptions that underlie most regimes of administrative adjudication, an argument for adjudication by the FAA could hardly lack surface appeal.

In the context of FAA practice, however, the benefits of the traditional model should not be overstated. Some are not relevant at all. Of those that are, most can be attained through the development of appropriate principles of adjudicative deference.

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[138] Among the legal challenges to the Demonstration Program is an argument that the FAA is in violation of constitutional and statutory separation-of-functions requirements. For a discussion, *see infra* notes 224-34 and accompanying text.

[139] *See, e.g.*, 49 U.S.C. app. 1901, 1903-06 (1982).

[140] *See* text accompanying *supra* notes 30-35.

[141] *See, e.g.*, B. Schwartz, Administrative Law sec. 1.5 at 9 (2d ed. 1984), citing Report of the Attorney General's Committee on Administrative Procedure 7 (1941).

[142] *See, e.g.*, Berg, Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication, 38 Ad. L. Rev. 149 (1986).

[143] *See, e.g.*, Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 185-86 (1973).

Departing from the assumptions that underlie what I have called the "traditional" model of an administrative agency, the FAA, according to its Chief Counsel, does not generally utilize adjudication as an instrument of policy development.[144] In common with an increasingly large number of other administrative agencies,[145] the FAA establishes policy principally through rulemaking, and it should be encouraged to do so.[146] Nor, when circumstances require, does adjudication by the NTSB preclude the FAA from using adjudication to develop substantive policy. For some years the FAA has litigated certificate actions before the NTSB, with NTSB adjudications occasionally resulting in rule-like formulations of substantive duties.[147] Finally, to the extent that adjudication may have an irreducible policy component, conferral of adjudicatory authority on the NTSB need not deprive the FAA of any discretionary authority that is necessary to effective interpretation and enforcement of the Federal Aviation Act and its implementing regulations. As recognized by existing Administrative Conference recommendations applicable to cases in which Congress employs a split-enforcement model, the FAA's proper prerogatives can, and should, be protected through principles of adjudicative deference.[148] I shall return to deference questions below.[149]

4. The balance

When policy arguments are weighed, those in favor of assigning civil money penalty cases to the NTSB emerge as compelling. Although I have not specifically studied the FAA's adjudication of Hazardous Materials cases,[150] the same arguments would appear to tell in favor of transferring those cases as well to the NTSB.[151] This allocation would represent a significant step in the direction of a smooth, simple, unitary system of administrative adjudication, subject to just one main set of procedural rules.

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[144] Interview with Gregory Walden, October 12, 1989.

[145] *See* Breger, The APA: An Administrative Conference Perspective, 72 Va. L. Rev. 337, 349-53 (1986) (discussing the relative decline of adjudication as a means of developing rule-like prescriptions and the corresponding arguments in favor of independent adjudication and sharper separations of functions).

[146] Among its advantages, rulemaking allows participation by all interested and affected parties, and it avoids the element of unfair surprise that sometimes inevitably attends the use of adjudication to shape and implement agency policies of general applicability. See generally Berg, *supra* note 142.

[147] *See, e.g.*, Tearney v. NTSB, 868 F.2d 1451 (5th Cir.), cert. denied, 58 USLW 3289 (1989) (upholding use of adjudication, in a certificate action before the NTSB, to establish what was effectively a "rule").

[148] *See* Administrative Conference of the United States, Recommendation 86-4, "The Split-Enforcement Model of Agency Adjudication, in Administrative Conference of the United States," Recommendations and Reports 18 (1986).

[149] *See infra* notes 190-206 and accompanying text.

B. Implementing a Transfer of Authority to the NTSB

For adjudication by the NTSB to advance the values of aviation safety, fairness, and efficiency, more would be required than a simple re-allocation of adjudicative responsibility. Among other things, the NTSB would need to be given adequate resources to assume the added duties. In addition, the precise contours of the division of power and responsibility between the FAA and the NTSB would need to be established. This part deals with four salient issues: (i) the magnitude of the NTSB's need for resources if it is to assume adjudicatory responsibility in civil penalty cases; (ii) the appropriateness of vesting the FAA with expanded power to "compromise" civil penalty cases; (iii) the deference, if any, appropriately given by the NTSB to interpretations and determinations of the FAA; and (iv) the capacity of the FAA to seek judicial review of decisions of the NTSB.

1. The NTSB's need for resources

In order to assume adjudicatory responsibility in civil penalty cases, the NTSB would need additional personnel. The question is not whether, but how many.

NTSB adjudication occurs at two levels. At the first, ALJs hold formal evidentiary hearings and render decisions. At the second, the full Board entertains administrative appeals. There is already a resource shortage at both adjudicatory stages.[152] At the trial level, the Board currently has six full-time

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[150] *See supra* notes 2 and 45.

[151] The number of cases that would be involved is not large. Only 68 notices of proposed civil penalty were issued in hazardous materials cases during the first 14 months of the Demonstration Period's operation. See Demonstration Program Statistics of October 31, 1989, *supra* note 66.

[152] *See* Prepared Testimony of James L. Kolstad, Acting Chairman of the National Transportation Safety Board, before the Committee on Public Works and Transportation, Subcommittee on Aviation, House of Representatives, Regarding the Federal Aviation Administration's Civil Penalties Demonstration Program, Nov. 15, 1989 (*hereinafter cited* as "Kolstad Testimony").

ALJs.[153] In order to keep up with its present volume of approximately 1,200 incoming cases per year, the Board has had to borrow an additional judge from the Department of Labor and has employed a retired ALJ on a part-time basis.[154] Even with the part-time assistance of two additional ALJs, the NTSB's office of law judges had a backlog of over 700 cases--the equivalent of more than six months' work--at the end of fiscal 1989.[155] The resource shortage is even more acute at the appellate level. The Board currently receives about 300 annual appeals from its ALJs' decisions and orders.[156] These are handled by attorneys in the Board's General Counsel's office, but the five available lawyers can devote only about half of their time to the appellate function.[157] As a result, there is currently a waiting period of roughly a year between the time an appeal is docketed and the time that it is heard.[158]

Projecting that its current responsibilities will soon swell its ALJs' yearly caseload from 1,200 to 1,500 and that the annual number of appeals will climb from 300 to 350, the NTSB has recently requested 10 additional positions--three ALJs, three attorneys, three legal technicians, and one legal secretary.[159] Whether or not the Board's specific requests are granted, its basic claim that it needs increased staff merely to handle its current caseload seems indisputable. So does its assertion that it would need still further increases before it could adjudicate civil money penalty cases.

In gauging the additional personnel needs that adjudicating FAA civil money penalty cases would impose, the Board estimates that it would require one ALJ and one staff attorney for each 200 added cases.[160] This calculation seems entirely reasonable. With respect to ALJs, the prediction that one ALJ could handle 200 cases jibes with the estimate of the former Chief

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[153] *Id.*

[154] This information was supplied independently in telephone interviews with John Stuhldreher, who at that time was the NTSB's General Counsel, on Dec. 14, 1989, and with Dina Claiborne, docket clerk in the NTSB's office of ALJs, on Dec. 19, 1989.

[155] Telephone interview with Dina Claiborne, NTSB docket clerk, Dec. 19, 1989.

[156] Kolstad Testimony, *supra* note 152.

[157] *See id.* For a discussion of the role of staff attorneys in cases reaching the NTSB on appeal, *see* note 40 *supra*.

[158] Telephone interview with then NTSB General Counsel John Stuhldreher, Dec. 14, 1989.

[159] *See* Kolstad Testimony, *supra* note 152.

[160] *See id.*

Administrative Law Judge in the Department of Transportation.[161] With respect to the need for attorneys in the General Counsel's office to handle appeals, the NTSB estimates that roughly one ALJ decision in four will be appealed, and that a full-time attorney should be able to handle about 50 cases per year.[162]

If the Board's calculation that it needs one ALJ and one staff attorney for every 200 additional cases is correct, as it appears to be, the crucial question involves the number of civil money penalty cases. How many are likely to require formal hearings? This is a devilishly difficult question. Over the most recent six months of the Demonstration Program for which figures are available, there has been an average of 44 requests for formal hearing per month.[163] If projected over a 12-month period, this rate would produce only 528 requests for ALJ hearings during calendar 1990. But this rate will almost certainly increase. As noted above,[164] there are, currently, over 2,800 cases pending in the administrative pipeline in which the FAA has issued a notice of proposed civil penalty but not yet either reached a settlement or received a request for a formal hearing. Any reasonable estimate of future caseloads must therefore include a projection of how rapidly these backlogged cases will proceed through the administrative process and how many will be closed without any need for formal adjudication.[165]

Although prediction is hazardous, planning should proceed in anticipation of roughly 1,000 requests for formal hearings per year, if not in 1990 then in the long run. The former Chief ALJ in the DOT has estimated that the Demonstration Program will generate roughly 600 requests for ALJ hearings during the next 12 months.[166] But this figure seems low. Of the roughly 1,560 Demonstration Program cases that had come closest to the end of the adjudicative process as of October 31, 1989,[167] about 1,200 orders assessing civil penalty (which are formal administrative findings of guilt) had issued without a request for formal hearing, while requests for formal hearings had been entered in 368 cases[168]--a rate of 24%. If that pattern is projected onto the approximately 4,000 civil penalty cases that can be anticipated next year,[169] the anticipated volume of annual requests for hearing is about 1,000.[170]

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[161] In an interview of Dec. 14, 1989, then Chief Judge William Kane of the DOT estimated that his judges could deal with a maximum of 100 to 110 actual hearings in civil penalty cases per year. Although this appears much smaller than the NTSB estimate, the NTSB figure of 200 cases per judge per year reflects the Board's experience that each judge can handle about 100 hearings per year, but that roughly half of its docketed cases settle prior to hearing. Interview with NTSB docket clerk Dina Claiborne, Dec. 19, 1989.

[162] *See* Kolstad Testimony, *supra* note 152.

[163] This information was provided in an interview with John Cassady, Deputy Chief Counsel at the FAA, on Dec. 18, 1989.

[164] *See* text accompanying *supra* notes 84-85.

[165] Based on statistics available to date, few of these cases are likely to be closed as the result of the FAA's withdrawal of a notice of proposed civil penalty. To date, the FAA has withdrawn notices of proposed civil penalty in only 10 Demonstration Program cases. Interview with John Cassady, Deputy Chief Counsel at the FAA, on Dec. 18, 1989.

[166] Interview with then Chief Judge William Kane, Dec. 14, 1989.

There are, of course, various grounds on which this basis for projection might be questioned. For example, the Demonstration Program's scheduled duration may have reduced the incentives that otherwise might have led to settlements in many backlogged cases. If the Demonstration Program had expired in December, 1989, it is unclear what would have happened to cases initiated under that program. Under these circumstances, defendants and their lawyers may have refused to settle cases in the hope that the program would expire. And with the program now extended only until April 30, 1990, defendants may continue to hope that the future will, at a minimum, bring circumstances in which they enjoy more bargaining advantages in settlement discussions than they currently possess.[171] If so, then a permanent system for the administrative imposition of civil money penalties might generate proportionately more settlements, and thus a lower rate of requests for formal hearings, than has the Demonstration Program. On the other hand, it is conceivable that defendants are postponing their requests for hearing until they learn the outcome of the case challenging the FAA's rules of practice that is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. There is simply no way to be certain.

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[167] This figure includes 1,224 cases in which orders assessing civil penalty had issued--whether as a result of adjudication, default, or voluntary settlement--and the 368 cases in which requests for formal hearings had been entered, less (in order to avoid double-counting) 27 cases in which an ALJ had entered an order assessing civil penalty at the conclusion of a formal administrative hearing and 5 cases that were dismissed after hearings were scheduled but before they were held. *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66.

[168] *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66.

[169] This assumes that the number of orders of proposed civil penalty will remain relatively constant in the months ahead. Although no projection is ever wholly secure, there is no obvious reason why the number of proposed civil penalties should change in any dramatic way.

[170] This projection gains some corroboration from recent experience in the somewhat parallel case of certificate actions. The FAA issued more than 4,000 notices of proposed certificate action in 1987 and again in 1988. *See* Demonstration Program Statistics of October 31, 1989, *supra* note 66. And in each year there were more than 1,000 requests for adjudications before the NTSB. Because of time lags, no precise figures on the ratio of notices of proposed certificate action to requests for ALJ hearings are available. But if, extrapolating from these figures, we assume roughly 4,000 notices of proposed certificate action generated roughly 1,000 requests for hearing on an annual basis, the rate would again be in the vicinity of 25%. And if that were the rate of requests for hearing in civil penalty cases, roughly 1,000 per year would again have to be anticipated. This basis for projection must of course be used with extreme caution, however, since the rate of requests for hearing is likely to vary enormously with the nature and severity of the penalty involved and with the character and financial circumstances of the defendants.

[171] The FAA has taken the position that the legislation authorizing the Demonstration Program precludes it from entering compromise settlements that do not include a formal finding of violation. *See* text accompanying *supra* notes 66-68. Representatives of the aviation

Thus, although I emphasize again that the uncertainty of the data makes any projection largely speculative, I would anticipate in the vicinity of 800 requests for formal hearings during 1990, and would further expect this number to climb to 1,000 annually as the currently backlogged cases move through the pipeline in the years ahead. If these estimates are accepted, and if the NTSB is correct that each 200 additional cases requires one additional ALJ and one additional attorney in the General Counsel's office, then the NTSB would need four or five new ALJs and four or five more full-time attorneys to absorb the civil money penalty cases now assigned to the FAA and its parent the DOT--and this beyond those staff increases necessary to handle the NTSB's currently existing caseload. The possibility that the necessary ALJs could be reassigned or borrowed from other agencies, including the DOT, should be explored. Although not optimal, a borrowing arrangement might suffice as a stop-gap measure.

2. Compromises of proposed civil penalties

One of the variables likely to influence the number of requests for formal adjudication is the capacity and willingness of the FAA to compromise proposed civil penalties. In addition, at the House subcommittee hearing on the future of the Demonstration Program that was held on November 15, 1989, several witnesses argued that the FAA should adopt more generous compromise policies in order to achieve a fairer system of sanctions.[172] The questions of what compromise authority the FAA ought to have, and of how it ought to exercise that authority, are therefore important ones.

Prior to the institution of the Demonstration Program, the FAA was under heavy practical pressure to settle its civil money penalty cases,[173] and it did so

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community have maintained that this policy with respect to compromises has much reduced the incentive to compromise. *See supra* note 70 and accompanying text.

[172] *See supra* note 99 and accompanying text.

[173] This was because the FAA lacked statutory authority to assess civil penalties, *see supra* notes 44-49 and accompanying text, and U.S. attorneys were often reluctant to prosecute civil penalty cases, due to the relatively small amounts of money that were typically involved because of the then-existing statutory maximum of a $1,000 fine per violation.

in approximately 90% of the cases closed through the receipt of civil money penalties between 1984 and 1988.[174] In implementing the Demonstration Program, however, the FAA has taken the position that the enabling statute deprives it of authority to enter compromise agreements without entering a formal finding of a violation[175]--an important condition that it had not previously imposed. The relevant statutory provision, 49 U.S.C. app. 1475, authorizes the agency to "assess" civil penalties not to exceed $50,000 "upon written notice and finding of violation."[176] As construed by the FAA, this language effectively forbids it to accept compromise payments without a "finding of violation."[177] The agency's interpretation hardly seems a necessary one. The provision of the Federal Aviation Act[178] under which the FAA exercised its compromise authority prior to the institution of the Demonstration Program, and continues to do so in cases involving penalties of more than $50,000, remains applicable in all cases--including those involving proposed civil penalties of less than $50,000--unless its grant of compromise authority was partially repealed by the enactment of section 1475(a). And it is a settled principle of statutory interpretation that repeals by implication should not be lightly inferred.[179] Nevertheless, the FAA is the agency responsible for implementing the statute, and its interpretation is entitled to substantial deference.[180] A judicial rejection of the FAA's construction is therefore unlikely.

Beyond the question of statutory interpretation, the FAA defends its policy of refusing to compromise without entering a finding of violation as indicated by the overriding interest in aviation safety. According to the FAA, formal findings of violation are necessary to achieve accountability and deterrence.[181] Violators, in the agency's view, should bear the repercussions of being designated as culpable; and a violator's history of prior misconduct should sometimes be viewed as an aggravating factor relevant in determining the appropriate sanction in a particular case. The FAA also points out that its requirement of a formal finding of violation does not preclude its consideration of mitigating circumstances; the agency remains open to negotiating reductions in the amount of assessed civil penalties.[182] The FAA only insists on making the fact of a violation a matter of record.

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[174] *See supra* note 66 and accompanying text.

[175] *See* FAA Disposition of Comments, *supra* note 67, at 11,916.

[176] 49 U.S.C. app. 1475(a) (1982 & Supp. V 1987).

[177] *See* FAA Disposition of Comments, *supra* note 67, at 11,916.

[178] 49 U.S.C. app. 1471 (1982 & Supp. V 1987).

[179] *See, e.g.*, 2A C. Sands, Sutherland on Statutes and Statutory Construction sec. 23.10, at 346 (N. Singer rev. 4th ed. 1984).

[180] *See, e.g.*, Chevron USA, Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

[181] *See* Letter of Gregory S. Walden, Chief Counsel of the Federal Aviation Administration, to James L. Oberstar, Nov. 11, 1989 (hereinafter cited as "Letter of Walden to Oberstar").

In contending that the FAA should be required to return to its prior policy of compromising civil penalty cases without insisting upon formal findings of guilt, representatives of the aviation community advance two principal arguments.[183] First, they maintain that the FAA's insistence on formal findings of violation diminishes the incentive to settle and thereby contributes significantly to the backlog of unresolved cases. Second, they contend that the refusal to compromise without a finding of guilt is unduly harsh in cases that involve, for example, a good faith error, or in which someone's employment prospects might be at stake.

The second of these arguments is less persuasive in context than it is in the abstract. Under the FAA's general criteria for the selection of sanctions, the agency seldom seeks civil money penalties against individual certificate holders whose livelihood may be at stake.[184] Civil money penalties are a common sanction only against air carriers and against persons who are not so connected with aviation as to require a certificate. Moreover, it is FAA policy to deal with minor violations through administrative action that does not result in either a notice of proposed civil penalty or a notice of proposed certificate action.[185] Whatever system of warnings or sanctions the FAA might ideally pursue with respect to individual violators whose cases involve mitigating circumstances and whose employment prospects may be at stake, those cases are not typically involved in the Demonstration Program.

More troublesome is the claim that the FAA's refusal to compromise without a formal finding of culpability contributes to a disturbingly large backlog of pending cases. There should be no blinking the fact that this issue potentially implicates aviation safety. Without a general requirement of formal findings of guilt as a means of establishing accountability, the FAA's Chief Counsel has argued, "there would be less incentive for the [violator] to improve its compliance posture and, therefore, the deterrent effect ... [of the sanction] would be minimized."[186] On the other hand, a lengthy delay between a violation and an adjudication leading to punishment is presumably not good for deterrence either. And in light of the FAA's inability to provide reliable estimates concerning the volume of future contested cases,[187] the possibility of very substantial delays--at least in the absence of a large infusion of adjudicatory resources--cannot be discounted.

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[182] *See* FAA Disposition of Comments, *supra* note 67, at 11,916.

[183] *See, e.g.*, Intervenors Brief, *supra* note 69.

[184] *See supra* notes 30-35 and accompanying text.

[185] *See* FAA Enforcement Handbook, *supra* note 30, ch. 11. The typical administrative action involves either a warning notice, *id*. at par. 1103, or a letter of correction, *see id*. at par. 1104. Administrative actions are recorded in the file of a certificate holder, *id*. at par. 1105, but, to "avoid undue burden to individual airmen," are "expunged after a period of two years." *Id*.

[186] Letter of Walden to Oberstar, *supra* note 181, at 7.

To the extent that a backlog develops, the issue, at one level, becomes one of how much deterrence the American public is or should be willing to pay for. My assumption, implicit in the recommendation that adjudicatory responsibility should be shifted to the NTSB, is that considerable new resources ought to be provided. But if the resources necessary for relatively prompt adjudications are not forthcoming--due to an unexpectedly large volume of cases or for other reasons--a tradeoff must be made between the deterrence value of formal findings of violation and the deterrence and other values promoted by the more prompt resolution and punishment that might occur if the FAA were to enter compromises without requiring formal findings of violation.

How to strike the balance in order to achieve maximum deterrence is a question that goes to the very heart of the FAA's mission and its expertise. The choice should be left to the judgment of the agency. In light of the agency's current interpretation of the pertinent statutes,[188] any legislation providing for the continued administrative imposition of civil money penalties should therefore be so drafted as to leave no doubt that the FAA has the authority to make this judgment. But the legislation should also make clear that agency retains administrative discretion to adopt a policy of refusing to settle without formal findings of violation. There is no inherent unfairness in denying alleged violators the opportunity to compromise their cases without a finding of violation. And, again, considerations of aviation safety may be at stake.

3. Deference by the NTSB to FAA interpretations and proposed penalties

If adjudicatory responsibility in civil money penalty cases is assigned to the NTSB, the FAA worries that its capacity to implement substantive policy will be undermined.[189] But how much (if any) the FAA suffers will depend on the degree of deference that the NTSB gives or is required to give to the FAA. Two deference issues are of particular importance: how much deference, if any, should the NTSB give (i) to FAA interpretations of the Federal Aviation Act and its implementing regulations and (ii) to the FAA's determination as to appropriate sanctions?

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[187] *See supra* notes 163-71 and accompanying text.

[188] *See supra* notes 67-68 and accompanying text.

[189] Conversation with Gregory Walden, October 12, 1989.

a. Questions of interpretation

Regarding questions of interpretation, the Administrative Conference of the United States ("ACUS") has recommended that, in cases involving the so-called split-enforcement model:

> Generally speaking, ... the adjudicatory agency must accept the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with law.[190]

This approach to deference questions, which would call for a statutory directive to the NTSB to give very substantial deference to the FAA, is neither uncontroversial nor costless. The federal courts of appeals, in reviewing decisions issuing from the so-called split-enforcement model used in another administrative context, that of the Occupational Safety and Health Act,[191] have often concluded that it is the independent adjudicatory agency, rather than the agency that promulgates regulations, to which judicial deference is owed--and thus, by implication at least, that the adjudicatory agency owes no deference to the promulgating agency.[192] The supporting arguments are easy to understand in the aviation context. The NTSB possesses expertise of its own in aviation matters, and requiring it to defer to the FAA may undermine, at least in part, the value of independent adjudication that the NTSB is expected to serve. Finally, it may also be relevant that the NTSB does not now, in adjudicating certificate actions, consider itself bound to defer to the FAA's interpretation of the Federal Aviation Regulations.[193] It would invite confusion for the NTSB to follow one set of deference principles in civil penalty cases and another in certificate actions. If the NTSB is required to give deference in civil penalty cases, it should therefore be required to do so in certificate cases as well--and this may seem an unwarranted interference in an adjudicatory scheme that is generally regarded as fair and successful.

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[190] Administrative Conference Recommendation 86-4, 1 CFR sec. 305.86-4, Recommendation 2.

[191] 29 U.S.C. app. 651-78 (1982). For a description of the administrative structure under the act, *see* note 134 *supra*.

[192] *See* Johnson, *supra* note 42, at 334-40. The first, fifth, and seventh circuits currently defer to the promulgating agency. *See* Donovan v. A. Amorello & Sons, 761 F.2d 61, 64-66 (1st Cir. 1985); United Steelworkers of America v. Schuylkill Metals Corp., 828 F.2d 314, 319-20 (5th Cir. 1987); Brock v. Zoological Soc'y, 820 F.2d 909, 912 (7th Cir. 1987). The second, fourth, sixth, eighth, ninth, and tenth circuits defer to the adjudicating Occupational Safety and Health Review Commission. *See* Marshall v. Western Electric, 565 F.2d 240, 244 (2d Cir. 1977); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1261-62 (4th Cir. 1974); Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127, 132 (6th Cir. 1978); Brennan v. OSHRC, 513 F.2d 713, 715-16 (8th Cir. 1975); Brock v. Bechtel Power Corp., 803 F.2d 999, 1000-01 (9th Cir. 1986); Dole v. Occupational Safety and Health Review Comm'n (No. 86-2641, 10th Cir., Dec. 22, 1989). With respect to the Mine Safety and Health Act, which Johnson's 1986 article, *supra* note 42, found to have spawned fewer "turf battles," *id.* at 341, there appears to be no dissent from the D.C. Circuit's conclusion that deference is owed to the Secretary of Labor, who promulgates regulations, rather than to the adjudicatory agency, the MSHRC. *See* Secretary of Labor v. Cannelton Industries, 867 F.2d 1432 (D.C. Cir. 1989).

Despite these concerns, the arguments that underlie the quoted recommendation of the Administrative Conference apply fully in the aviation context. The FAA, not the NTSB, is the agency responsible for promulgating and enforcing substantive regulations adequate to protect the public safety. Judgments about how the federal aviation regulations should be interpreted in order to fulfill their purposes can therefore be viewed as falling within the presumptive domain of the FAA's responsibility and its expertise. Nor are concerns for fairness and the value of adjudicatory independence trampled by the ACUS recommendation that was quoted above. That recommedation can and should be read to contemplate review of adequate scope to ensure both fairness and the appearance of fairness. Thus, unless an exception applies or unless the Administrative Conference is willing to reconsider the recommendation that it made in 1986, the Conference's stated position supports a requirement that the NTSB accept FAA interpretations of the Federal Aviation Regulations "unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with law."

The strongest argument that penalties for aviation safety violations should be treated as exceptional under the ACUS recommendation involves the felt severity of the relevant sanctions. A certificate suspension or revocation may immediately threaten the livelihood of an individual pilot or other certificate holder; civil money penalties, although not often assessed against individual certificate holders, could also damage future employment prospects in cases where they are used.[194] If this circumstance warrants an exception to the 1986 recommendation, or if the Conference were willing to reconsider its position, a compromise solution might be appropriate. Although the principle is well accepted that adjudicating bodies, typically courts, should defer to administrative interpretations of administratively propounded standards, deference is most problematic in cases in which the administrative interpretation is first adopted, possibly by a relatively low-level agency employee, in the context of an enforcement action.[195] An agency's claim to "expertness" may be compromised nearly as much as its claim to "impartiality" when it insists on deference to a postion that may be influenced, if not determined, by its desire to win a lawsuit.[196]

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[193] A Lexis search of published NTSB decisions failed to reveal any express invocation of deference principles by the Board in construing the Federal Aviation Act and its implementing regulations, and some decisions clearly seem to involve the exercise of independent judgment by the NTSB. *See*, *e.g.*, Administrator v. Thomas, 3 NTSB 3203 (1981); Administrator v. Conley, 3 NTSB 2236 (1980). A nondeferential stance seems to be wholly consistent with, and possibly called for by, the Board's current statutory mandate in certificate actions. *See supra* note 39 and accompanying text.

[194] *See supra* note 69 and accompanying text.

In light of concerns about fairness and its appearance, a possible compromise solution would be that the NTSB should not be required to accept any agency interpretation that can escape condemnation as "arbitrary, capricious, or otherwise not in accordance with law." Within a scheme familiar in other areas of administrative law,[197] the NTSB might instead be directed to accord some deference to FAA interpretations that are developed for the first time in the context of litigation, but the deference would be of a kind calibrated not to assess the formal authority of those interpretations, but to reflect their "power to persuade."[198] If, however, the FAA Aministrator seeks judicial review of an adverse NTSB decision on the ground that it incorrectly resolves a question of significant public interest,[199] then the reviewing court might still be directed to give deference to the interpretation of the FAA's Administrator, rather than to the judgment of the NTSB, under the formula prescribed by the Administrative Conference's 1986 recommendation.

This compromise proposal would have the virtue of promoting fairness by giving alleged violators the benefit of independent judgment by the NTSB in cases that are not of large public consequence, while accommodating the FAA's overriding interest in the promotion of public safety in cases of more general importance. Indeed, this proposal would accord the FAA more deference in the interpretive process than it currently appears to receive in certificate actions--the FAA's preferred form of sanction in cases involving the most serious safety violations. Under current law, the NTSB appears to accord no special deference to FAA interpretations,[200] and the FAA has no authority to appeal adverse decisions of the NTSB.[201] Among its attractions, this compromise position would also ensure that the FAA interpretations to which judicial deference was required reflected the considered judgment of the FAA Administrator--not merely the view of a lower-level prosecutorial employee who might be influenced excessively by zeal to prevail in a particular case.

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[195] *See* Anthony, Which Agency Interpretations Should Bind Citizens and the Courts? (forthcoming in the Yale Journal on Regulation).

[196] *Cf.* Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 519-20 (1989).

[197] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgments in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.

[198] *Id.*

[199] For a recommendation that the FAA should be able to appeal adverse NTSB decisions only when this standard is satisfied, *see* text accompanying *infra* notes 207-12.

b. Appropriate sanctions

A related set of deference issues involves appropriate penalties: how much deference, if any, should be accorded to the FAA's recommendation as to sanctions? In certificate actions, the NTSB has prescribed a substantially deferential standard, first articulated in *Muzquiz v. NTSB*:[202] "in those cases in which all of the violations [found by the FAA] are affirmed," an ALJ and then the Board itself should accept the FAA's recommendation as to sanctions unless "clear and compelling reasons" mandate a reduction.[203] The reasons for applying this standard in certificate actions, as explained by the NTSB itself, are generally convincing,[204] and they apply equally in civil penalty cases:

> The *Muzquiz* standard reflects the belief that where the Administrator has proved all of the charges underlying an order suspending an airman certificate, his judgment on the proper term of suspension should be accepted, since it presumably rests on a determination that a sanction of a specific duration is warranted to vindicate the various enforcement interests the individual charges collectively implicate. The deference thus accorded the Administrator, in

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[200] *See supra* note 39.

[201] *See* 49 U.S.C. app. 1429(a), 1486 (1982 & Supp. V 1987).

[202] 2 NTSB 1474 (1975).

[203] According to at least one recent commentator, the deference prescribed by *Muzquiz* "has arguably eroded in recent years." Tello, *supra* note 65, at 5 n.34 (citing Administrator v. Harbin, Order EA-2571 (1987)). The Board, however, continues to cite *Muzquiz* as controlling authority. *See, e.g.*, Administrator v. Fallon [a Fallon who is unrelated to the author of this report], Order EA-2728 (1988).

[204] *See* Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 185-86 (1973):

> Where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter of administrative competence.' American Power Co. v. SEC, 329 U.S. 90, 112 (1946). Thus, the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it 'unwarranted in law ... or without justification in fact ....' *Id.*

> recognition of his responsibilities respecting air safety, should be observed, under the standard, unless clear and compelling reasons, cognizable within the Board's review authority, justify a different sanction.[205]

For reasons of consistency and familiarity,[206] the current standard might be reformulated without any substantial change of meaning: in those cases in which all violations cited by the FAA are affirmed, the NTSB should accept the FAA's recommended sanction unless the agency's recommendation is arbitrary, capricious, or otherwise not in accordance with law.

c. Appeals by the FAA

Under current law, the FAA has no authority to appeal adverse NTSB decisions in certificate actions to the courts of appeals.[207] This structure may create a risk of underexplained decisionmaking by an NTSB that knows that decisions that are adverse to the FAA will not be subject to judicial review. In addition, if the NTSB is given adjudicatory responsibility in civil penalty cases, there will inevitably be uncertainty about the exact boundary between its power and discretion and that of the FAA.[208] This situation calls for a disinterested policing of the bounds by an independent judiciary.[209] The FAA should therefore be authorized to seek judicial review of adverse NTSB decisions in both certificate actions and civil penalty cases that raise questions of significant public interest.

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[205] Pearson v. NTSB, 3 NTSB 3837, 3838 (1981). In *Muzquiz*, the Board offered the further reason that, in the absence of required deference to the Administrator's recommended sanction, ALJs' decisions too often had the "appearance of an effort to try to satisfy both parties--the FAA by affirming all violations and the airman by reducing the sanction." 2 NTSB at 1477.

[206] *See supra* note 190 and accompanying text (quoting the ACUS recommendation concerning the deference appropriately given to a promulgating agency's interpretation of its standards).

[207] *See* 49 U.S.C. app. 1429(a), 1486 (1982). The FAA may, however, appeal adverse ALJ decisions to the full Board.

[208] On the uncertainties that have sometimes attended split-enforcement models, see Johnson, *supra* note 42.

[209] In other situations involving a split-enforcement model, the Secretary of Labor can appeal adverse decisions by the independent Occupational Safety and Health Review Commission, see 29 U.S.C. 660(b) (1982); Donovan v. A. Amorello and Sons, Inc., 761 F.2d 61, 62 (1st Cir. 1985) (Breyer, J.), and the Mine Safety and Health Administration can appeal decisions of the independent Mine Safety and Health Review Board, see 30 U.S.C. 816(b) (1982). The Director of the Office of Personnel Management is authorized to appeal decisions of the Merit Systems Protection Board in cases that she believes "will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d) (1988).

In cases in which the Administrator seeks judicial review of an NTSB decision, the prevailing party should be named as the respondent. The NTSB is not a party in interest and should not be named as such; its function, analogous to that of a court, is that of an independent adjudicator.[210] It might be objected that allowing the FAA to seek judicial review would unduly burden private parties who have prevailed in the NTSB, especially in cases involving relatively minor civil penalties. For them, the costs of appellate litigation may be excessive; some may simply default. In light of this concern, the FAA's authority to seek judicial review should be limited to cases in which, in the judgment of the Administrator, the adverse decision of the NTSB is one that involves a question of significant public interest.[211] But a more general prohibition against appeals by the FAA would unduly threaten the public interest in a properly administered enforcement system and in aviation safety.[212]

V. Second Best: Improving the FAA's Rules of Practice

Although I have recommended that civil penalty cases should be adjudicated by the NTSB, that suggestion may be rejected. If so, I would continue to recommend a program of administrative assessment of civil penalties of the scope of those involved in the Demonstration Program. The question then would be how to structure a fair and efficient adjudicatory system within the FAA's parent agency, the Department of Transportation.

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[210] *Cf.* Oil, Chemical and Atomic Workers International Union v. Occupational Safety and Health Review Comm'n, 671 F.2d 643, 652 (D.C. Cir. 1982) (reasoning that OSHRC, as "a purely adjudicative entity," holds a position like that of a district court and "has no duty or interest in defending its position on appeal" and distinguishing the Federal Communications Commission, the National Labor Relations Board, and the Federal Energy Regulatory Commission in whose cases concrete adverseness exists). There is, however, a division among the courts of appeals with respect to whether the OSHRC is a proper party to an OSHA appeal. *See id.* at 651 (collecting cases). Cf. 5 U.S.C. 7703(d) (1988) (authorizing the Merit Systems Protection Board to "appear" in proceedings in which the Director of the Office of Personnel Management seeks judicial review of its judgments). This recommended party structure on appeal also avoids the justiciability issue that might be presented were one federal agency, the FAA, seeking to litigate a dispute with another federal agency, the NTSB. In that circumstance it would it least be arguable--although not persuasively so, in my view--that the nominal parties' dispute is essentially intra-governmental, and that it lacks the concrete adverseness necessary to a constitutional case under article III.

[211] *Cf.* 5 U.S.C. 7703(d) (1988) (authorizing the Director of the Office of Personnel Management to petition for judicial review of decisions of the Merit Systems Protection Board only if "the Director determines, in his discretion, that ... the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.").

[212] In conformity with familiar practice in cases involving federal executive agencies, responsibility for the appellate litigation of FAA civil penalty cases in the courts of appeals might reasonably be vested in the Department of Justice.

In addressing this question, discussion appropriately begins with an important element of common ground. Even within the frequently cacophonous debate over the Demonstration Program, virtually everyone seems to agree that, if civil penalties are to be imposed administratively, administrative hearings should be on the record and that they should comply with the requirements of the Administrative Procedure Act. Beyond this foundational assumption, however, legal and normative disagreements abound.

In the current context of acrimonious disagreement and pending litigation, a dilemma arises for a report such as this. In light of all the fairness and efficiency concerns that are potentially at stake, it would be a hopelessly complex enterprise to try to define and argue for, point-by-point, a complete and optimal set of administrative structures and procedural rules. A much more realistic mode of approach is to frame a discussion of appropriate procedural rules in terms of those elements of the Demonstration Program's rules of practice that have attracted the most sustained and powerful criticisms. Yet this approach suffers its own drawbacks. With a suit challenging the FAA's rules of practice currently pending, the United States Court of Appeals for the District of Columbia Circuit may soon provide a definitive resolution where this report can only furnish legal opinions. In addition, to assess the legal issues framed by the contentious parties is almost necessarily to accept the terms of a generally lamentable debate--one whose tone has fed an atmosphere of mutual distrust and resentment that could hardly advance, and could conceivably hamper, the public interest in aviation safety.

Within the terms of this dilemma, I see no practical choice but to accept the second horn and to assess the procedural rules promulgated by the FAA. There is no guarantee that the D.C. Circuit will resolve the purely legal issues concerning the validity of individual provisions. The court may hold the case unripe,[213] or it may void the FAA's rules of practice as improperly promulgated because of the absence of any prior notice or opportunity for comment.[214] Moreover, in assessing the overall adequacy of a set of procedural rules, standards of sound administrative policy as well as legal permissibility ought to be employed. Indeed the former may be especially important. In order to foster an attitude of respect and cooperation that is maximally conducive to aviation safety, the FAA, in the present context, should be prepared to accept reasonable accommodating changes that are consistent with its overriding substantive mission of promoting aviation safety. To say this is not to endorse every criticism of the rules. It is merely to recognize the importance of the appearance, not just the reality, of fairness, open-mindedness, and good will.

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[213] The FAA, in its brief, develops a long and substantial ripeness argument. *See* Brief of Respondent Department of Transportation in No. 89-1195, Air Transport Association of America v. Department of Transportation, *et al.* (D.C. Cir.) (hereinafter cited as "FAA Brief"), at 17-23.

[214] For a discussion of this issue, which was the principal focus of the oral argument in the case, *see infra* notes 215-23 and accompanying text.

A. Unlawful Adoption

The Air Transport Association argues that the FAA propounded its rules of practice for the imposition of civil money penalties without providing a prior opportunity for notice and comment as required by APA section 553.[215] As a matter of construction of the APA, this challenge ought to fail. Section 553(b)(3)(A) explicitly exempts "rules of agency organization, procedure, or practice" from the prior notice requirement.

In its brief in the court of appeals, the ATA relies on *Brown Express, Inc. v. United States*,[216] under which the test for applying the section 553(b3)(A) exemption for procedural rules "is not whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated."[217] But this test departs far from the language of the statute, and its validity has been questioned even by the Fifth Circuit Court of Appeals that originally propounded it.[218] The trend of more recent cases, especially in the DC. Circuit, reflects a sensible shift in focus from "asking whether a given procedure has a `substantive impact' on parties to inquiring more broadly whether the agency action . . . encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[219] Under a formulation such as this, the FAA's rules of practice do not alter the federal aviation regulations that directly regulate primary conduct, nor do they change the substantive criteria used by the agency in applying those regulations.[220]

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[215] 5 U.S.C. 553 (1988).

[216] 607 F.2d 695, 702 (5th Cir. 1979).

[217] *See* ATA Brief, *supra* note 96, at 47.

[218] *See* American Transfer and Storage Co. v. Interstate Commerce Commission, 719 F.2d 1283, 1285 (1983).

[219] American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (citations omitted).

[220] *See id.*

Even if the question whether rules are properly "procedural" within the meaning of the APA is to some extent "one of degree--whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA"[221]--the FAA's rules should fall within the statutory exemption. The rules' primary effect is to influence how questions are litigated. They do not, like some rules to which section 553(b(3)(A) has been held inapplicable, "foreclose" any party from receiving fair substantive consideration of a claim or defense.[222]

Beyond the APA, however, lie concerns of sound administrative policy. Forceful policy arguments support an ideal of more public participation in the drafting of procedural rules than the FAA allowed.[223] In addition, as will be discussed below, parts of the rules should be revised in the interests of clarity, the appearance of fairness, and sound administrative policy. If responsibility for assessing civil money penalties is retained within the FAA and the DOT, the FAA ought to give notice of a proposed rulemaking to revise its rules of practice and should invite public comment on a proposed set of revised rules.

B. Separation of Functions

As long as adjudicative responsibility is located within the FAA and the DOT, questions arise about whether there is an appropriate separation of functions between those personnel who investigate and prosecute cases and those who advise the adjudicative decisionmakers. The separation-of-functions provision that was promulgated under the Demonstration Program states as follows:

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[221] Lamoille Valley R. Co. v. ICC, 711 F.2d 295, 328 (D.C. Cir. 1983).

[222] *See id.* Reeder v. FCC, 865 F.2d 1298 (D.C. Cir. 1989), a case that was much discussed at oral argument in the ATA's legal challenge to the FAA's rules of practice, is essentially a case of this kind. *Reeder* grew out of an admittedly substantive FCC rulemaking aimed at the allocation of nearly 700 new FM broadcast channels. In conjunction with its promulgation of a proposed rule allocating the new channels, the FCC issued a second rule, which it denominated as procedural, to regulate the submission of comments on and counterproposals to the proposed allocational rule. This second rule, which the FCC issued without following a notice-and-comment process, departed from settled FCC practice by precluding an existing FM station from proposing that its capabilities be upgraded as a substitute for the incompatible allocation of new broadcast channels that was contemplated by the draft rule that was published by the FCC for public comment. In concluding that the rule precluding the upgrade "counterproposal" was not "procedural" within the meaning of section 553(b)(3)(A), the *Reeder* court followed circuit precedent holding the "procedural" exception inapplicable to rules that foreclose a party from receiving fair substantive onsideration of a claim or defense. Accordingly, *Reeder* is wholly consistent with the view that the FAA's rules of practice, which have no similarly preclusive effect, are "procedural" within the meaning of the APA and are therefore exempt from the notice and comment requirements of section 553.

[223] *See generally* Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 521, 573-75 (1977).

> Any agency attorney engaged in the performance of prosecutorial functions in a case shall not, in that case or a factually related case, participate in or advise the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker under this subpart, except as a witness or counsel in public proceedings. The prohibition described in this paragraph shall begin at the time that a notice of proposed civil penalty is issued.[224]

This provision has attracted criticism from various groups, including the ABA Section of Administrative Law and Regulatory Practice.[225] Apparently in response, the FAA, on January 13, 1989, published a notice in the Federal Register to "advise[] the public of how the separation of functions" would be implemented in civil penalty actions under its rules of practice: after a notice of proposed civil penalty has issued, the Chief Counsel will not perform any prosecutorial functions or supervise prosecuting attorneys; and the Assistant Chief Counsel for litigation and his staff, in order to be available to assist in advice-giving functions, will not perform prosecutorial functions.[226] This clarification fails to respond to the central complaint lodged by the FAA's critics. Although the agency's separation-of-functions provision prohibits advice to the FAA decisionmaker by "any agency attorney engaged in the performance of prosecutorial functions in a case," it contains no prohibitions against advice-giving by lawyers who have performed investigative functions. And the separation-of-functions provision of APA section 554(d) specifically refers to investigative functions: "An employee or agent engaged in the performance of *investigative* or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision ...."[227] The FAA's rule similarly fails to include language tracking the APA's prohibition[228] against communications between investigators and prosecutors on the one hand and ALJs on the other. The ATA thus argues that the FAA's separation-of-functions rule violates the plain language of the APA, or at least that it will lead to violations in some cases.[229]

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[224] 14 CFR sec. 13.203(b) (1989).

[225] *See* Katzen letter, *supra* note 93.

[226] *See* 54 Fed. Reg. 1335 (Jan. 13, 1989).

[227] 5 U.S.C. 554(d) (1988) (emphasis added).

[228] *See id.*

In response, the FAA offers two generally convincing arguments.[230] First and most fundamentally, there is no need for the FAA to promulgate rules prohibiting what is already prohibited by the APA. Since section 554(d) applies to FAA personnel, a further FAA rule is not required to protect the APA's underlying values. Second, in light of the division of responsibilities within the agency, troubling mixtures of functions are highly unlikely to occur in practice. The Chief Counsel, although he advises the FAA decisionmaker, seldom if ever conducts or manages investigations. And personnel in the offices where investigations are performed "do not advise the administrative law judge on initial decisions and do not advise the Administrator on appeals in civil penalty cases."[231]

Although the legal arguments against the FAA's current separation-of-functions provision fail to establish that it should be judicially invalidated, the FAA has acknowledged that changes that do no more than reiterate the already binding prohibitions of APA section 554(d) would in no way hinder its enforcement mission.[232] Moreover, whisperings among aviation lawyers suggest a disturbingly widespread suspicion that separation of functions is inadequately observed within the office of the Chief Counsel.[233] Because of the importance of perceptions of fairness, the FAA should consider expanding the prohibitions expressly stated within its separation-of-functions rule to incorporate the APA's prohibitions against advice-giving, either to an ALJ or to the agency decisionmaker, by lawyers who have performed relevant investigative or prosecutorial functions.[234]

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[229] *See* ATA Brief, *supra* note 96, at 25-29.

[230] *See* FAA Disposition of Comments, *supra* note 67, at 11,915-16.

[231] Letter from Walden to Oberstar, *supra* note 181, at 9.

[232] *See id.*

[233] This conclusion emerges largely from interviews that I conducted in conjunction with the preparation of this report. Cf. Report to Congress of Alan Armstrong on the Federal Aviation Administration's Civil Penalty Assessment Demonstration Program 9 (August 10, 1989):

> Absent a resolution of the matter between the Agency and the airman, the case is tried before an Administrative Law Judge, and any party dissatisfied with the Judge's decision must appeal to James S. Dillman, the FAA's Assistant Chief Counsel for Litigation. Interestingly, Mr. Dillman's office is in close physical proximity to the offices of Allen H. Horowitz, the FAA attorney who supervises its Enforcement Policy Branch. Of further interest is the fact that before the Notice of Proposed Civil Penalty is issued, there is nothing which prohibits conferences between Mr. Horowitz and Mr. Dillman about impending cases.

[234] The ATA has recently offered an "Edit" of the FAA's rules of practice that expresses its suggestion as to how an acceptable separation-of-functions rule might be written. See Air Transport Association of America, Edit of Final Rule Implementing Civil Penalty Demonstration

C. Complaints Denominated as "Orders"

According to the FAA's rules of procedure, the FAA initiates an administrative action by issuing an "order of civil penalty."[235] The ATA contends[236] that this mode of procedure violates APA section 556(d), which provides that an "order" may not be issued except on consideration of "the whole record" following a hearing.[237] This argument, as the FAA points out, is more semantic than persuasively substantive. The FAA's "order of civil penalty" is in effect a complaint; indeed every such order states specifically that "this Order ... serves as the Complaint in this proceeding."[238] As both this language and the FAA's rules concerning the function of an order of civil penalty make clear, there is no legally effective "order" of the kind contemplated by section 556 until further administrative action leads to an "Order Assessing Civil Penalty."[239]

Although not unlawful under the APA, the FAA's denomination of its complaints as "orders" is confusing. As the ATA charges, the nomenclature could conceivably intimidate civil penalty defendants.[240] In a revised set of rules of practice, the FAA ought to change the relevant provision to label the documents that it uses to commence formal penalty proceedings as "complaints," "petitions," or "notices."

Program of the Federal Aviation Administration, Attachment to Comments of the Air Transportation Association of America on the Draft Report and Recommendations of the Adjudication Committee of the Administrative Conference of the United States Concerning The Civil Penalty Demonstration Program of the Federal Aviation Administration, section 13.203 (February 15, 1990) (*hereinafter cited* as "ATA Edit"). The ATA's proposal appears to go beyond the APA by forbidding the Chief Counsel to perform investigative or prosecutorial functions, or to supervise employees engaged in such functions, at any stage of any case.

[235] *See* 14 CFR 13.16(h), 13.201, 13.208 (1989).

[236] *See* ATA Brief, *supra* note 96, at 21-24.

[237] *See* 5 U.S.C. 556(d) (1988).

[238] *See* FAA Brief, *supra* note 213, at 25.

[239] *See* FAA Disposition of Comments, *supra* note 67, at 11,916; 14 CFR 13.201, 13.232 (1989). An initial decision to issue an order assessing civil penalty may be made by an ALJ following an administrative hearing in contested cases. In uncontested cases, a legally effective "order assessing civil penalty shall be issued" by the FAA without a formal hearing. 14 CFR 13.16 (e)(1), (g)(1) (1989).

[240] *See* ATA Brief, *supra* note 96, at 24.

D. Unequal Use of Formal Admissions

Section 13.220(l)(3) of the FAA's rules of practice permits the FAA, but not a respondent, to use "admissions" that occur in one proceeding in subsequent cases.[241] The ATA charges that this disparity offends due process and is arbitrary and capricious under the APA.[242] Treated as a facial challenge to the FAA rules, the ATA's argument is unpersuasive. No individual provision of the APA specifically aims to forbid the kind of disparity created by section 13.220(1)(3). Moreover, although various due process issues are imaginable on the facts of hypothetical cases, no broad or general principle prohibits asymmetrical rules (treating the government differently from other parties) that are rationally crafted to recognize the special needs and mission of government agencies charged to promote the public interest.[243]

In defending section 13.220(l)(3), the FAA gives a generally persuasive justification for treating respondents' admissions differently from those of government employees. On the one hand, the FAA plausibly contends that it should be able to rely on admissions from prior cases, especially to establish the compliance disposition that is appropriately taken into account in determining the amount of a civil penalty.[244] On the other hand, the agency reasonably argues that its nationwide enforcement jurisdiction and the supervening concern for aviation safety justify precluding the use of admissions that might thwart the government's enforcement efforts.[245] If any change is warranted in section 13.220(l)(3), it would be to make clear that the rule does not--as the FAA represents that it does not[246]--preclude an ALJ from allowing a respondent to use an FAA admission from a prior case if such use is necessary to avoid fundamental unfairness.[247]

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[241] *See* 14 CFR 13.220(l)(3) (1989).

[242] *See* ATA Brief, *supra* note 96, at 29-32.

[243] Cf. Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant").

[244] *See* Letter from Walden to Oberstar, *supra* note 181, at 10-11.

[245] *See id.*

[246] *See* FAA Brief, *supra* note 213, at 32.

[247] The ATA Edit, *supra* note 234, section 13.220(1)(3), which would preclude the government from relying on admissions in subsequent cases, goes further than fairness requires. If the FAA continues to believe that this limitation would unduly restrict the government's capacity to introduce evidence that is material to the public interest in aviation safety, *see supra* note 244 and accompanying text, its judgment should not be lightly disregarded.

E. Limits on Testimony by Agency Employees

The ATA has lodged a variety of complaints against section 13.227, which deals with testimony by agency employees.[248] That section reads as follows:

> An employee of the agency may not testify as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of the agency may testify in a proceeding governed by this subpart only as to facts, within the employee's personal knowledge, giving rise to the incident or violation.[249]

1. Expert and opinion testimony

The ATA objects first to the provision that FAA personnel may not "testify as an expert or opinion witness, for any party other than the agency."[250] According to the ATA, limitations on the testimony of government employees create a bias in the government's favor, since the FAA "is free to turn defendants' employees into 'experts' against defendants but no similar attempt is permitted by defendants against the government."[251] The ATA also argues that section 13.227 may offend fundamental fairness by excluding relevant testimony.[252] In response, the FAA contends that there would be a significant "disservice to the public interest ... if agency employees, imbued with the color and authority of their public offices, were subject to providing expert opinions on behalf of nongovernment interests ... [since] it would be futile to separate their 'official' and 'nonofficial' views."[253]

Although the question is not wholly free from difficulty, the FAA seems to have the better of the argument. The FAA is in fact unlikely to achieve a comparative advantage by exploiting defendants' experts, since the government will predictably rely on its own experts in nearly all cases. Moreover, fundamental fairness probably requires no more than that agency employees must be available to testify when they possess evidence that is unavailable from other sources--something that is unlikely to be true with respect to expert or opinion testimony.

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[248] *See* ATA Brief, *supra* note 96, at 32-36.

[249] 14 CFR 13.227 (1989).

[250] *See* ATA Brief, *supra* note 96, at 32 n.18.

[251] *See* ATA Brief, *supra* note 96, at 32.

[252] *See id.* at 34.

[253] *See* FAA Brief, *supra* note 213, at 34.

2. Hearsay testimony and relevant facts

Read literally and a-contextually, section 13.227 forbids FAA employees to offer hearsay testimony or testify as to facts other than those "giving rise to the incident or violation."[254] The ATA argues that this limitation offends due process and is arbitrary and capricious under the APA because of its effect in excluding evidence by FAA employees that might be relevant to a defense.[255] The FAA responds that, when the quoted language is viewed in context, its sole purpose is to elaborate and clarify the distinction between expert and opinion testimony by government witnesses, which section 13.227 admittedly circumscribes (see above), and testimony bearing on facts, which the FAA says that the rule does not so circumscribe.[256] In other words, the FAA reads its own rule as not in fact introducing the limitations on employee testimony to which the ATA objects. There is, accordingly, no real, focused dispute about what the rule ought to be: government employees should be able to testify as to all facts relevant to any disputed issue, and hearsay testimony by government employees should be admissible on the same basis as hearsay testimony by others.[257] If responsibility for adjudicating civil penalty cases remains within the DOT, the rules should be re-written to reflect this understanding. A simple deletion of the problematic sentence might suffice.[258]

F. Written Arguments

The FAA rules of practice embody a strong presumption that ALJs should decide cases based on oral testimony and argument, without post-hearing briefs: "Only in a clearly complex or unusual case, the administrative law judge may request or the parties may agree to file written posthearing briefs, instead of final oral argument ...."[259] The ATA argues that this provision will deny the "reasonable opportunity" to submit proposed findings and conclusions that is guaranteed by 5 U.S.C. 557(c).[260] But what is a "reasonable opportunity," as the FAA's rule implicitly recognizes, will vary with the facts and complexity of individual cases. The FAA's assumptions that "the majority of cases ... will involve simple issues, not requiring written arguments for their disposition" and that waiting for written submissions would unnecessarily "delay[] proceedings"[261] appear to be reasonable ones that lie within the expertise of the agency. Moreover, due process in the constitutional sense can probably be ensured by judicial identification of unreasonable refusals to call for or agree to the submission of briefs, should they ever arise, on a case-by-case basis.

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[254] 14 CFR 13.227 (1989).

[255] *See* ATA Brief, *supra* note 96, at 36.

[256] *See* FAA Brief, *supra* note 213, at 36.

[257] 14 CFR 13.222(c) (1989) generally allows the introduction of hearsay evidence. It provides that "The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility."

[258] This is the recommendation of the ATA. *See* ATA Edit, *supra* note 234, section 13.227.

[259] 14 CFR 13.231(c) (1989).

[260] *See* ATA Brief, *supra* note 96, at 40.

As a matter of sound administrative practice, however, section 13.231 seems unduly restrictive. Although the FAA has recently argued that "no administrative law judge has yet refused a contested request by a person to submit written proposed findings and conclusions,"[262] the relevant language allows exceptions "only in a clearly complex or unusual case."[263] In order to promote fairness and the perception of fairness, parties should be allowed to file written briefs in support of motions and proposed findings whenever, in the opinion of the ALJ, the interests of justice so require.[264]

G. Modifications of Civil Penalties

According to 14 CFR 13.232(a, an ALJ who "reduces the civil penalty contained in the order of civil penalty" issued by the FAA "shall provide a basis supporting the reduction in civil penalty."[265] The ATA contends that this provision reverses the burden of proof that 5 U.S.C. section 556(d) imposes on the agency as the "proponent of a rule or order."[266] The FAA responds, generally persuasively, that there is no shift in the burden of proof, which its own rules of practice as well as the APA place on the agency.[267] The purpose of section 13.232(a), according to the agency, is to ensure, in the event the ALJ reduces a civil penalty, that "both the Administrator [and] a reviewing court ... can engage in reasoned review of that decision."[268]

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[261] *See* FAA Disposition of Comments, *supra* note 67, at 11,918.

[262] *See* FAA Brief, *supra* note 213, at 38.

[263] 14 CFR 13.231(c) (1989).

[264] The ATA Edit, *supra* note 234, section 13.231, risks needless delay by creating a procedural right to file written posthearing briefs in every case. This proposal seems to be of a piece with the ATA's apparent preference for written over oral decisions. *See id.*, section 13.232(b). Except in complex cases, an effective requirement of written decisions risks a needless and counterproductive slowing of the machinery of justice.

[265] 14 CFR 13.232(a) (1989).

[266] *See* ATA Brief, *supra* note 96, at 42.

[267] *See* FAA Brief, *supra* note 213, at 39 (citing 14 CFR 13.224(a) and 5 U.S.C. 556(d)).

A related objection to section 13.232(a) is that it creates the appearance, if not the reality, of a pro-prosecutorial bias. Any such appearance diminishes upon a close reading of the FAA's rules of practice. Under them, an ALJ who accepts a proposed civil penalty must make a finding as to "the reasonableness of any sanction contained in the order of civil penalty."[269] There is thus greater evenhandedness than the ATA has acknowledged. Nonetheless, if the FAA commences a rulemaking to revise its rules of practice, it should provide a stylistic revision of section 13.232(a) to highlight the parallel treatment of cases in which an ALJ accepts and those in which an ALJ reduces the recommended civil penalty.

H. Concluding Observations on the Procedural Rules Dispute

I conclude this section with the same sense of unease with which I began. Fair procedural rules are a necessity, not merely a desideratum, of an acceptable adjudicatory scheme. But the dispute over the FAA's rules of practice has too often resounded with intimations and allegations of bad faith and with posturing, intransigence, and nit-picking. What is most wanted is a change of demeanor.[270]

To call for a change of demeanor, both by the FAA and by the legal representatives of the aviation community, may sound and indeed may be simplistic. The tenor of the current debate may reflect deep-seated underlying attitudes that may be attributable to starkly divergent views about substantive regulatory policy that lie beyond the scope of this report. In short, establishing a healthy partnership in the pursuit of aviation safety may be a complex, multi-faceted task, in which debates over procedural rules are more incidental than central.

But if constructive work is needed in order to foster the attitudes most conducive to fair and effective regulation in the interests of aviation safety, the formulation of procedural rules is, at least, a front on which cooperative work might be done; and constructive work should be done. That is the central message of this section. Many of its more specific conclusions--for example, that it is not unlawful for the FAA to denominate its complaints as "orders"--are tinged with the pettiness of the controversies to which they respond.

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[268] *See* FAA Brief, *supra* note 213, at 40.

[269] *See* 14 CFR 13.232(a) (1989).

[270] The change may indeed have begun to occur. FAA officials have represented publicly that the agency will shortly initiate a notice-and-comment rulemaking leading to amended rules of practice. And the ATA, one of the most important industry groups, has already offered constructive suggestions as to how the existing rules might be edited to satisfy its views of fairness and the appearance of fairness. *See* ATA Edit, *supra* note 234.

VI. Summary and Conclusions

Strong policy arguments support the administrative imposition of civil money penalties for violations of the Federal Aviation Act and its implementing regulations. Nor is there any constitutional impediment under either article III or the seventh amendment. A scheme of administrative imposition should therefore be retained.

In light of concerns about administrative efficiency, fairness and its appearance, and aviation safety, the preferable forum for the administrative assessment of civil money penalties is the National Transportation Safety Board. For the NTSB to assume responsibility for civil penalty cases, it would need additional resources. Those resources should be provided. In order to protect the prerogatives of the FAA as the agency with principal responsibility for the promulgation and enforcement of rules adequate to protect the overriding interest in aviation safety, legislation should direct the NTSB, in its adjudicatory capacity, to give appropriate deference to the FAA's interpretations of relevant standards and to the agency's determinations as to appropriate sanctions. Legislation should also be drafted to make clear that the FAA has administrative discretion to compromise disputed cases without requiring a formal finding of a violation, and to authorize FAA appeals from adverse NTSB decisions in cases involving issues of significant public interest.

If the National Transportation Safety Board cannot be furnished with ample resources to adjudicate civil money penalty cases, then adjudicative responsibility should, on a second-best basis, be assigned to the FAA and its parent agency, the DOT. The DOT and the FAA, if they retain adjudicative responsibility, should act quickly to amend the procedural rules implemented during the Demonstration Program. Representatives of the aviation community, for their part, should assume responsibility to participate constructively in a procedural rulemaking process.

Ultimately, a system of administrative adjudication should assist the FAA in carrying out its statutory responsibilities; it should afford the aviation community the benefits of swift, accurate, and relatively inexpensive adjudication; and it should, above all, advance the paramount public interest in achieving aviation safety under a fair administrative system.

Appendix of Recommendations

1. Congress should continue to provide for the administrative imposition of civil money penalties for violations of provisions of the Federal Aviation Act and its implementing regulations relating to aviation safety.

    a. Legislation providing for the continued administrative imposition of civil money penalties should make clear that the FAA has administrative discretion to compromise disputed cases without requiring a formal finding of a violation.

2. Congress should vest adjudicatory responsibility for civil money penalty cases under the Federal Aviation Act and its implementing safety regulations in the National Transportation Safety Board.

    a. Congress should give the NTSB adequate personnel resources to handle the additional caseload.

    b. Congress should prescribe that the NTSB, in its adjudicatory capacity, must give appropriate deference to the FAA's interpretation of statutes and regulations pertaining to aviation safety; and that the NTSB, in imposing civil penalties in cases in which it upholds all findings of violation cited by the FAA, should accept the FAA's determination as to the appropriate sanction unless it can be shown that the agency's determination is arbitrary, capricious, or otherwise not in accordance with law.

    c. Congress should authorize the FAA to seek judicial review of adverse NTSB decisions in cases that, in the judgment of the Administrator, involve issues of significant public interest.

3. If Congress should choose to leave adjudicatory responsibility for the assessment of civil money penalties in the FAA and its parent Department of Transportation, the FAA should act quickly to amend its applicable rules of practice.

    a. The FAA should give advance notice of proposed rulemaking and invite prior public comment on its proposed rules of practice.

    b. In drafting proposed amendments to its rules of practice and in responding to comments, the FAA should strive to remove ambiguities in existing rules and to promote not only fairness but the appearance of fairness.

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Report for Recommendation 90-2

Ombudsmen in Federal Agencies: The Theory and the Practice

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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"THE MOUSE THAT HATH BUT ONE HOLE IS EASILY TAKEN"

- - Old English Proverb

I. INTRODUCTION

There are ombudsmen sprinkled here and there throughout the federal government. The Taxpayer Ombudsman in the Internal Revenue Service (IRS) is probably the best known. Least well known, perhaps, is the ombudsman in the Army Materiel Command (AMC), which is part of the Department of the Army. In between, one finds the Resource Conservation and Recovery Act (RCRA) Hazardous Waste ombudsman in the Environmental Protection Agency (EPA) (which also has an ombudsman for small business matters and asbestos questions), the tattered remnants of an ombudsman program in the Department of Commerce, and another at the Interstate Commerce Commission. There is a flourishing band of ombudsmen in the long term health care field, mandated by Congress, funded with federal grants, and administered by state governments. At one time or another all but one of these programs achieved remarkable results; many still do, particularly those in the IRS and AMC.

Over the years since public officials and political scientists began asking whether the ombudsman concept, a Scandinavian innovation, could be successfully grafted onto American government, the Administrative Conference of the United States (the Administrative Conference or Conference) has been concerned with the debate and analysis of that question. It commissioned this report to help it determine whether it should recommend more systematic use of the ombudsman as a means of improving the administration of government programs by the executive branch.

The report considers the record of six ombudsmen, those in the IRS, AMC, RCRA program, the ICC, the Commerce Department and the federally supported long term health care ombudsmen at the state level. By talking to the people who run and use these programs, we hoped to learn what makes an ombudsman's office work, what makes it fail, and when and under what circumstances establishing an ombudsman makes sense. The report does not deal, except in passing, with ombudsman programs that address employee grievances. It deals only with those programs set up to help the public solve the problems encountered in dealing with the government: problems of misadministration, negligence, human error and omission, and the sleights and oversights that can complicate dealings with the bureaucracy.

The ombudsman idea is not new. The first one set up shop in Sweden in 1809. The first one in this country, at least at the federal level, came into being in 1971. Twenty years, as government institutions go, is not a long time. Nevertheless, there is an adequate record for at least a preliminary assessment of the value of federal ombudsmen programs; enough to go on to support the view that, as a rule, federal departments and agencies administering programs that serve or directly affect large numbers of the public, should have an effective ombudsman program.

We are not writing on a clean slate. There is both a fair amount of experience here and elsewhere in the world and a wealth of literature on the subject. The first major section of the report summarizes the history of American interest in the ombudsman as an institution of government. The next section of the report presents the six case studies. The third section raises some of the underlying issues presented when the creation of an ombudsman is under consideration. In the last section, some of the federal programs and agencies, such as the Social Security Administration, that would appear to benefit by establishing an ombudsman are identified and recommendations are set forth.

II. GROWTH OF AMERICAN INTEREST IN THE OMBUDSMAN

A. The American Ombudsman Movement

The ombudsman has been defined as "an independent government official who receives complaints against government agencies and their officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints."[1] Trouble shooting and proposing ways to improve the delivery of government services have been the primary functions of American ombudsmen. Both functions are aided by the powers of investigation and report, the major tools (apart from persuasion) used by the ombudsman, who otherwise lacks the authority to compel compliance with decisions or to make policy. The ombudsman is intended to serve as the option of last resort, rather than as a substitute for existing grievance handling procedures.

Until quite recently, there were no public officials with that title, that status, or that mission in American government. In fact, the Office of

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[1] Stieber, Carolyn, *Government Ombudsman Share Global Complaints: Notes from Canberra,* THE ARBITRATION JOURNAL, Vol. 44, No. 2, p. 42 (June 1989).

Personnel Management does not even have a classification for the ombudsman position. Given the general expectation that government be prompt, fair and responsive, one may well ask why.

Before World War II, Americans had less occasion to seek out a neutral go-between to cut red tape and solve problems when their local and state governments got bogged down in normal channels. In the New England town meeting, for example, each voter had a convenient forum at which to call the town manager and the selectmen to account for open pot holes and late school buses. The ward organizations of the city political machines that held sway at that time gave urban residents access to city hall. It was not until the New Deal that citizens began to look to the federal government for unemployment, retirement, health care and educational benefits on anything like the scale we know today. One reason, then, that there were no ombudsmen as such until the late 1960's or 1970's is that there was less need for such an official to help us deal with government problems.

Because elected officials and party organizations viewed the go-between function as an incident of the political process, it has not been an easy matter to persuade them to share this duty with politically independent officials, or, more aptly, to persuade them that the ombudsman function is separate. As one mayor is reputed to have said when the question was put to him: "(here) ombudsman is spelled M A Y O R."[2] Indeed, the response most often heard when you propose setting up an ombudsman is "we do not need one." The response comes not only from elected officials who are reluctant to share credit for having a traffic light installed, but also from the public employees who install the light. They argue that the ombudsman would hinder them by adding an additional level of supervision.

The writings and lobbying efforts of a small group of inquisitive and perceptive lawyers and political scientists established the beachhead from which interest in the concept spread overland. What is remarkable, in retrospect, is not that the ombudsman idea took so long to gain acceptance here; it is the extent to which it took hold at all.[3]

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[2] Interview with Bernard Frank, Esq., Allentown, PA, Thursday August 10, 1989.

[3] *cf.*, Zagoria, Sam, *The Ombudsman: How Good Governments Handle Citizen's Grievances*, Cabin John, MD: Seven Locks Press, 1988, p.65 (Hereafter, Zagoria, *The Ombudsman*.)

1. The First Settlers

Ten years ago, Stanley V. Anderson[4] canvassed the early American literature on the nature and likely applications of ombudsmen service in this country.[5] Anderson credits Professor Henry Abraham with publishing the first article ("A People's Watchdog Against Abuse of Power") in 1960. Abraham, who studied in Denmark as a Fulbright scholar, wrote about the then new Danish ombudsman program. Subsequent articles by Kenneth Culp Davis and Donald C. Rowat, Rowat's 1965 book, *The Ombudsman*, and two definitive works by Walter Gellhorn[6], *Ombudsmen and Others* (1966) and *When Americans Complain* (1966), all made significant contributions to our knowledge of the nature and workings of ombudsmen.

These observers found much of interest in the European experience. Sweden, the first country to establish a national ombudsman, did so in 1809. Provision for the Swedish ombudsman is found in its constitution.[7] The legislature appoints the ombudsman for four-year terms. The office has authority to review both executive and judicial actions and, in appropriate cases, may bring or recommend prosecution of public officials for malfeasance in office. The Swedish law requires that the complaint be kept confidential and gives the ombudsmen audit authority which is used as the basis for departmental investigations. To a greater or lesser degree, all the ombudsmen created since Sweden pioneered the concept owe much to the Swedish experience.

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[4] Professor Anderson taught in the Political Science Department at the University of California at Santa Barbara and served as the Director of the affiliated Ombudsman Activities Project. He was also the author of *Canadian Ombudsman Proposals* (1966), the editor for *Ombudsman for American Government?* (1968), published by the AMERICAN ASSEMBLY, and wrote *Ombudsman Papers: American Experience & Proposals* (1969) published by the INSTITUTE FOR GOVERNMENTAL STUDIES at the University of California at Berkeley.

[5] For these references and other works in the early literature see Anderson, Stanley V., *Ombudsman Readings*, INTERNATIONAL OMBUDSMAN INSTITUTE, 1980, Chapter 1, pp. 1-19. (Hereafter referred to by author's name, e.g., Anderson, Chapter 8.)

[6] Professor Gellhorn, a founding member of the Administrative Conference, and a member of its Council, is also the author of the Model Ombudsman Statute which has been used as the basis for laws and ordinances creating state (e.g., Nebraska) and local (e.g., Seattle-King County, WA) ombudsmen.

[7] "Ombudsman" is a Swedish word meaning "agent" or "representative," according to Reuss, Henry S. & Anderson, Stanley V, *The Ombudsman: Tribune of the People*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE, Vol. 363 (January, 1966), p. 45. The term "ombudsman" is now used widely and often rather loosely to describe any functionary with responsibility to consider a grievance. The classic Scandinavian ombudsman, by contrast, is a constitutional officer appointed by parliament to conduct "dispassionate inquiries into problems of which an individual's complaint might be merely a symptom of a general condition rather than a self-contained whole." Letter, Walter Gelhorn, Professor Columbia University School of Law to Charles Pou, Esq., Administrative Conference of the U.S., March 16, 1990.

Finland in 1919 became the second country to establish an ombudsman. It is also appointed by the legislature and is empowered to review judicial decisions for fairness as well as those of the executive branch.[8]

Two of the next three countries to adopt ombudsman programs were also in Scandinavia: Denmark in 1955 and Norway in 1962. New Zealand also established an ombudsman in 1962. The post war ombudsmen, like the early models, had power to review executive branch decisions, but they were not given authority over the judicial branch, and may not institute prosecutions of public officials. They have discretion, in some cases, to issue public reports of their findings. Indeed, the power of report as it is sometimes called, is the power by which the ombudsman's findings and recommendations gain credence. Appendix A contains a brief description of some of the ombudsman programs established in other foreign countries.

2. Spread of American Interest in Ombudsmen

The first ombudsman, that established in Sweden, came into being 150 years before Americans first took serious notice of the concept. There are several reasons for the long delay. The relative isolation of the two countries, an isolation enforced by distance and by cultural, lingual, and political differences, was largely responsible. Indeed, the idea was slow to spread to any other part of the world, and it was not until the Danish adaptation of the Swedish institution in the mid-1950's that use of the concept spread substantially. This was due in large part to the efforts of the first Danish ombudsman, Professor Stephan Hurwitz. Hurwitz wrote extensively on the subject, travelled to other countries to spread the word, and gave frequent talks to academic and political audiences. It was at this time that he became acquainted with three Americans who did much to import the concept to the United States: Professors Gellhorn, Davis and Abraham.

In 1967 the thirty-second meeting of the American Assembly adopted a statement by general agreement urging "the prompt enactment of laws to create the special office required to handle citizens' complaints, the Ombudsman."[9] The following year the Western American Assembly on the Ombudsman, made up of sixty-six members with university, government and private sector backgrounds expanded on the previous year's work by the parent American

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[8] Rowat, Donald C., *The Ombudsman Plan: The Worldwide Spread of the Idea*, Lanham, Md.: University Press of America, 1985, p. 7. (Hereafter cited as Rowat, *The Ombudsman Plan*.

[9] *The Ombudsman*, Report of the Thirty-second American Assembly, Columbia University, 1967, p.8.

Assembly. The Assembly's findings sum up the case for the creation of ombudsmen and explain the interest in the concept:

> a. All citizens do not enjoy equal access to existing mechanisms for redress of grievances. Voices do not speak with similar clarity nor do they fall on equally receptive ears.
>
> b. Elected officials in responding to selected complaints often provide solutions for specific cases, but may not solve the underlying causes of the problem itself. The result is often to provide a special service for some constituents rather than to bring equity among all citizens.
>
> c. Where complaint mechanisms exist in administrative agencies, their operation may tend to reinforce current procedures and to condone employee actions rather than to meet the problems causing the grievances.
>
> d. Judicial resolution of citizen grievances is an important but limited and costly remedy.[10]

The fourth finding reflects what citizens often discover to their dismay, if not their peril, that is that the provision of full and fair procedures--notice and trial-type hearings, internal review procedures, access to the courts for judicial review--may be of little value in many situations. Indeed, many grievances are wholly unjusticiable. Walter Gellhorn offers, as an example, the whistle blower who is simply ignored rather than punished and thus has no grievance that entitles him to a hearing. But he may have a tale that would interest an ombudsman, not only in the merits of wrong reported by the whistle blower, but also because of the manner in which the matter was considered.[11]

On the strength of its factual findings, the Assembly made a number of recommendations. Of those, the most relevant to this study urged that "the concept of the Ombudsman be introduced at the federal level . . . . Because of the vast size and diversity of federal operations, we do not recommend the establishment of a single office of Ombudsman."[12]

The Administrative Law Section of the American Bar Association (ABA) formed a committee to consider the ombudsman concept in 1967. In 1969 the

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[10] *Report, Western American Assembly on the Ombudsman*, Stanley Scott, Editor, INSTITUTE OF GOVERNMENTAL STUDIES, University of California, Berkeley, September, 1968, p. 26 (hereafter cited as W.A.A. Report).

[11] We are indebted to Walter Gellhorn both for this example and the observation that not all grievances can be addressed effectively in trial-type hearings. Letter, Walter Gelhorn to Charles Pou, March 16, 1990.

[12] Ibid., p.27. (Emphasis in original.)

ABA House of Delegates passed a resolution urging adoption of ombudsman in the United States. At the federal level the ABA initially proposed that the Administrative Conference of the United States serve as a central ombudsman for the federal government and that it sponsor research and experiments with the concept in specific agencies.[13] The ABA modified this proposal in 1971 when it proposed a program limited to a particular geographical area, government agency, or program.[14] The ABA's interest continues to the present. In August 1989 the ABA House of Delegates adopted a resolution recommending that the Secretary of Labor establish an office of ombudsman/advisor in some states to provide counselling in unemployment insurance claims for those who could not afford adequate representation.[15]

B. The Early Federal Legislative Proposals

Legislation reflecting the interest in the ombudsman concept followed (if, indeed, it did not help stimulate and further) the surge of interest in the 1960's. These bills took two forms. One called for the creation of a Congressional Ombudsman to assist members with constituent case work. The other called for the creation of an ombudsman in selected executive branch departments and agencies.

1. The Ombudsman for Congress

In 1963 Rep. Henry S. Reuss (D.-Wis.) introduced a bill to establish an Ombudsman for Congress.[16] Reuss' goal was to centralize constituent case work in a single office on the Hill. He argued that the economies of scale gained by centralizing the case work function would permit the development of staff experts in the various case work subject areas.

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[13] Section 3 of an American Bar Association Resolution dealing with the establishment of an Ombudmsan adopted during the Midyear Meeting of the House of Delegates in 1969. See also; Rowat, *The Ombudsman Plan*, p. 86.

[14] ABA Administrative Law Section Ombudsman committee revised Ombudsman Resolution dated April 15, 1971. See also; Rowat, *The Ombudsman Plan*, p. 86.

[15] ABA Resolution adopted upon recommendation of the Section of Labor & Employment law on August 9, 1989, Report #108-A. Letter, from Walter H. Beckham, Jr. Secretary ABA to Marshall J Breger, Chairman, Administrative Conference of the U.S., dated Sept. 19, 1989.

[16] "Administrative Counsel" was the name given to the ombudsman in the July 16, 1963 Reuss bill, H.R. 7593. *See* CONGRESSIONAL RECORD, (88th Cong. 1st Sess.), July 16, 1963, p. 12069 for text and Congressman Reuss' remarks when he introduced the bill. Rep. Reuss reintroduced the bill in each of the following Congresses, as H.R. 4273 in 1965, as H.R. 3388 in 1967 and H.R. 8017 in 1969. Rep. Owens introduced similar legislation H.R. 7680 on May 9, 1973. A similar Senate proposal was introduced by Sen. Hartke, S. 2134 (92nd Cong., 1st Sess.) in 1971 and reintroduced along with Sen. Gravel as S. 2500 on September 28, 1973.

The proposal made little headway. Opposition came from members of Congress who were unwilling to give up any control over the constituent case work function, an objection that Reuss attempted to meet by requiring that the Congressional Ombudsman work only on cases referred to it from members and that the ombudsman report the results to the member rather than directly to the constituent. Others argued that the central ombudsman might not be zealous enough in advocating the constituent's position. The ABA argued that the plan went too far too fast.[17] The high water mark for the Reuss legislation was a hearing on the companion measure introduced in the Senate by Claiborne Pell (D.-R.I.) in 1965.[18]

2. Ombudsmen for Executive Agencies

The other type of legislation introduced in the 1960's and early 1970's proposed creation of ombudsmen in selected executive departments and agencies mainly to deal with problems encountered by citizens eligible for benefits from federal entitlement programs. These bills did not pass but probably did help build interest in the inspector general laws that were passed in the 1970's to deal with fraud, waste and abuse.[19]

In 1967, Senator Edward Long (D.-Mo.) introduced legislation to establish an Ombudsman at the Administrative Conference to deal with the Social Security Administration, the Veterans Administration, the Internal Revenue Service and the Bureau of Prisons.[20] Long added the Selective Service System to his list of covered agencies in 1968.[21] The Long bill permitted the ombudsman to deal directly with the complainant. The agencies which were covered objected to the proposal on the ground that the oversight was not necessary and would add another layer of bureaucracy.[22]

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[17] Anderson, Stanley V., *Ombudsman Papers: American Experience & Proposals*, INSTITUTE FOR GOVERNMENTAL STUDIES: University of California at Berkeley, 1969, p. 17. (Hereafter referred to as *Ombudsman Papers*).

[18] S.984 was introduced on Feb. 3, 1965. Hearing before Senate Committee on the Judiciary, Subcommittee on Administrative Practice & Procedure, (89th Cong. 2nd Sess.), March 7, 1966.

[19] Interview with Bernard Frank, Esq., Allentown, PA, Thursday August 10, 1989.

[20] S. 1195, March 7, 1967. See *CONGRESSIONAL RECORD*, (90th Cong. 1st Sess.), March 7, 1967, pp. S. 3201-3203, for discussion and text. The Subcommittee on Administrative Practice & Procedure of the Senate Judiciary Committee held a hearing on Senator Long's proposal to create administrative ombudsmen for the federal agencies specified in his bill on January 16, 1968.

[21] Anderson, *Ombudsman Papers*, p.20

In 1971, Sen. Jacob Javits (R.–N.Y.) introduced the Administrative Ombudsman Experimentation Act.[23] The Javits bill proposed ombudsman projects in three regions to provide services to low income groups in their dealings with the Health, Education and Welfare, Housing and Urban Development, and Labor Departments and the Office of Economic Opportunity. The bill also proposed a foundation to conduct ombudsman research and demonstration projects.

Rep. Cornelius Ryan (D.-Cal.) introduced legislation in 1972 to provide federal grants in aid to states which established corrections ombudsmen for prisoners, parolees and probationers.[24] In 1973, Rep. Kenneth Keating (R.-N.Y.) and Rep. Lee Metcalfe (D.-Mont.) introduced bills to establish an ombudsman for the federal Bureau of Prisons and the Board of Parole.[25] Senator Charles L. Percy (R.-Ill.) introduced a bill in 1973 to establish an ombudsman for the federal criminal justice system.[26] Senator Gaylord Nelson (D.-Wis.) introduced a bill in 1974 to create Federal Citizens' Advisory Boards in the ten federal judicial circuits to review complaints against agency actions.[27] In its report the Senate Watergate Committee proposed the establishment of the Office of Public Attorney to act as a special prosecutor and ombudsman to investigate conflict of interest matters in the executive branch.[28]

3. Outcome

None of these bills became law. Indeed, none of them were reported out of committee. Everard Munsey, administrative assistant to Congressman Reuss for much of the period in question, thought that part of the reason lay in the difficulty of transplanting a uniquely European tool of government to American political soil.[29] For all of their good intentions, some of the bills had serious flaws. The Reuss bill, by requiring the ombudsman to work through the congressional office involved, added a layer of organization that makes the process seem top heavy. There was also (and still is) the turf argument. Congressmen are, after all, the "ombudsmen" of first resort for many constituent problems. Many members viewed the proposals as likely to reduce the credit they receive for helping to handle, if not always resolve, the problems constituents have with the federal government.

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[22] Ibid, at pp.20-21.

[23] S. 2200 92nd Cong. 1st. Sess. (1971). A similar bill, H.R. 9562, was introduced in the House By Rep. Steiger and Rep. Reuss. See Rowat, pp. 86-87.

[24] Rowat, *The Ombudsman Plan*, p. 87.

[25] Rep. Keating introduced H.R. 11,146 on Oct. 19, 1973. Rep. Metcalfe introduced H.R. 8848 (June 20, 1973), H.R. 9270 (July 12, 1973), H.R. 9543 (July 24, 1973), and H.R. 10,216 (Sept. 12, 1973. (All 93rd Cong. 1st Sess.)

[26] S. 2160 introduced on July 12, 1973. (93rd Cong. 1st Sess.)

[27] S. 3043 introduced on February 21, 1974. (93rd Cong. 2nd Sess.)

[28] Report, Senate Watergate Committee, July 13, 1974.

[29] Munsey interview, November 9, 1989. President Lyndon B. Johnson, who is recalled as saying "I don't like the term and I can't spell it," reflects some of the difficulty Munsey referred

Finally, the initial proposals were made at the moment when Congress was enacting the social programs that made up the 'great society' vision of President Johnson and the post-Kennedy Congresses. These programs were enacted with a view toward solving problems, not creating them. In that climate, the notion that the government needed ombudsmen to function efficiently may have seemed incongruous. By the time that the bureaucratic tanglements created by these programs became apparent, the country was more inclined to look for ways to cut the federal budget than increase it.

C. The Legacy of the Early Interest and Legislation

Although none of the bills introduced in this period became law, ombudsman programs gradually became established at all three levels of American government.

1. Federal Ombudsmen

The earliest ombudsman established in the federal government was set up in the Department of Commerce in 1971 by then Secretary Maurice Stans. That office, which is one of six studied for this report, is described and its history analyzed below. It started with a bang and ended with a whimper. But, in the 25 months or so that it was at its top form, it showed the value of establishing an executive department ombudsman. Other early federal experiments were conducted in the Social Security Administration, which tried a Beneficiary Ombudsman for a year or so; and by the Internal Revenue Service, a step which led to the establishment of what is by many measures the most successful of the present federal ombudsman programs.[30] Appendix B briefly discusses other federal ombudsman programs that have been attempted over the years.

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to. President Johnson's remarks were passed on to us by Benny Kass, Esq. in an interview September 26,1989.

[30] The Taxpayer Ombudsman is discussed and analyzed below.

2. State Ombudsmen

The first state ombudsmen projects were inaugurated with assistance from grants in aid provided by the Office of Economic Opportunity (OEO).[31] The University of California also provided assistance for these early state programs. Hawaii in 1967 was the first state to pass legislation creating an ombudsman to help its citizens cope with problems stemming from their dealings with state government agencies.[32] Nebraska followed suit in 1969,[33] Iowa in 1970 and Alaska in 1975.[34] The District of Columbia, Puerto Rico and Guam also have ombudsman, although the former, set up to deal mainly with conflict of interest questions, is essentially moribund.

3. County and Municipal Ombudsmen

It appears that the first municipal ombudsman in this country was the "public protector" appointed by the Nassau County, Long Island, county executive in 1967.[35] Jackson County, Missouri established an ombudsman in 1970 to deal with racial conflicts.[36] The city of Seattle and King County, Washington, combined to set up an ombudsman in 1970. The office was separated into its constituent parts in 1979, and in 1982 the city closed its ombudsman office. The county ombudsman is currently operating. The city of Dayton, Ohio, and Montgomery County, Ohio established a joint ombudsman with OEO and Kettering Foundation assistance in 1971. There are municipal ombudsmen in Buffalo and Jamestown, New York, and in Detroit and Flint, Michigan, among other cities.[37]

4. Other Ombudsmen

The ombudsman movement spread to quasi-public and private institutions, as well as state and local governments. Many businesses, hospitals, universities, and newspapers set up ombudsmen to deal with customer, patient, student and reader complaints.[38] While there is no accurate census of the number of public and private ombudsmen in the United States, there are, according to one source, several thousand "counsellors, investigators, mediators and shuttle diplomats" with complaint handling functions working in this country.[39]

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[31] By 1968 ombudsman legislation had been introduced in a majority of states. To date, however, no other state or territory has established an ombudsman. Rowat, *The Ombudsman Plan*, 1985, p. 87.

[32] 2 Hawaii Rev. Stat. sec. 96-2 to 96-8 (Supp. 1974).

[33] 5 Neb. Rev. Stat. Sec. 81-8, 240 to 81-8, 254 (1971).

[34] Alaska, Statutes, Title 24, Chapter 55.

[35] Rowat, *The Ombudsman Plan*, p. 83.

[36] Zagoria, *The Ombudsman*, p. 29.

[37] Zagoria, *The Ombudsman*, p. 71, 74. See also, Rowat, The Ombudsman Plan, p. 90-92.

D. The ACUS Role in the American Ombudsman Movement

The 1964 law creating the Administrative Conference of the United States[40] directs it to recommend ways of improving the operations of the government. The American interest in the ombudsman movement, moreover, coincided with the creation of the Conference. Given its mission and the nature of the ombudsman function, it is probably not surprising that proposals were made to designate the Conference as the nation's ombudsman for matters involving the federal government. As noted earlier, both Senator Long and the ABA put forward such plans. They were abandoned, however, in the face of budget and logistical difficulties. Nonetheless, the Administrative Conference has engaged in and supported a considerable amount of research on the subject.

An early Administrative Conference study by consultant Arthur E. Bonfield led to a recommendation to provide a "people's counsel" to represent the poor in federal rulemaking proceedings.[41] Professor Victor G. Rosenblum's Conference study on federal agency complaint handling mechanisms,[42] concluded that a single federal ombudsman would not be practical because agency complaint handling procedures were not uniform. More recently, a study by Mark H. Grunewald led to an Conference statement advocating a federal ombudsman to deal with Freedom of Information Act matters.[43] Administrative Conference member Kenneth Culp Davis chaired the Administrative Law Section Committee of the ABA which sponsored that group's initial resolution supporting the use of ombudsmen. Jerre Williams, the first Conference chairman, advocated the use of ombudsmen at the 1968 Western American Assembly Conference at Berkeley which was convened to consider the desirability of using ombudsmen at the various levels of government. A 1974 article by the Conference's second Chairman, Roger Cramton, also advocated using federal ombudsmen.[44] Walter Gellhorn, of course, gave the concept currency with the publication of his two works on ombudsmen.[45]

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[38] Article, *Ombuds Jobs Are Proliferating, And Characterized by Diversity*, 2 BNA ADR REPORT 198 (May 25, 1988).

[39] Rowe, Mary & Simon, Mary, *Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Record-Keeping*, unpublished report presented at the annual Society of Professionals in Dispute Resolution Conference, Washington, D.C., October 1989.

[40] Administrative Conference Act, 5 U.S.C. 552, 571-576 (1970)

[41] ACUS Recommendation 68-5, *Representation of the Poor in Federal Rulemaking of Direct Consequence to Them*, 1 CFR Section 305.68-5.

[42] *Handling Citizen Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices*, 26 Ad. Law Rev. 1 (Winter 1974).

[43] *See Recommendations & Reports*, Administrative Conference of the United States, Vol. II, pp. 71 & 1341 (1987).

In 1966, Professor Gellhorn concluded his study of governmental grievance handling mechanisms[46] with the proposal that American governments try the ombudsman system:

> "But even though a grievance bureau, no matter how well qualified, could not blow away the citizenry's irritations, it would support a thoroughly reasonable expectation of improvement."

He went on to say that it is a relatively simple and inexpensive matter to experiment with the idea, one that can be tried "without committing its proponents so deeply that they can never afterward bear to admit failure."[47] To succeed, he said, one needed topnotch personnel, understanding supporters, and public servants who are not actively antagonistic.[48] As he pointed out, these "are not forbidding conditions."[49]

III. CASE STUDIES

In 1971, the first federal ombudsman (that we have identified) was established in the Department of Commerce. Others have followed, some started on an experimental basis and abandoned, several made permanent after a trial; still others seem to have been set up with the idea that they would be permanent. There is now enough experience with the use of ombudsmen at the federal level to begin evaluation of their utility and to make recommendations for expanding their use.

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[44] Cramton, Roger C., *A Federal Ombudsman*, DUKE LAW JOURNAL, Vol. 1972 No. 1, April 1972, p. 1

[45] Gellhorn, Walter, *When Americans Complain: Governmental Grievance Procedures*, and *Ombudsman & Others: Citizens' Protectors in Nine Countries*, Cambridge, MA: Harvard University Press, 1966. Also see fn. 6, *supra*.

[46] *Gellhorn, When Americans Complain*, pp. 231-232.

[47] Ibid.

[48] Ibid.

[49] Ibid.

Six federal ombudsman programs are considered in some detail in this section of the report. The first four, those in the IRS, Army Materiel Command, the long term health care field and EPA, are all in operation today. Each says something about what works (or does not work), and each tends to bear out Gellhorn's view that topnotch personnel, informed support and a receptive bureaucracy are necessary. The other two programs, those set up in the Department of Commerce and at the Interstate Commerce Commission, are no longer functioning as ombudsmen programs. But their histories, like those of the programs now in operation, provide useful measures of what makes for a good program. These six programs are considered in turn.

A. The Taxpayer Ombudsman

TYPE: Mixed Executive/Legislative. Originally established by agency order in 1980. Congress subsequently gave the office certain powers and responsibilities in the 1988 Omnibus Taxpayer Bill of Rights.

THUMBNAIL DESCRIPTION: Responds to individual taxpayer complaints after regular channels fail; represents taxpayer viewpoints in IRS policymaking matters; identifies and proposes solutions to systemic problem. Has statutory power to suspend enforcement actions pending investigation and resolution of complaints. National headquarter staff (of 20) oversees work of approximately 225 district, service center and region office Problem Resolution Program staff members who do the casework. Well regarded by taxpayers and tax preparers; efficiently handles large volume of cases (over 400,000 a year); understaffed, underfunded; needs greater exposure to public.

CURRENT HOLDER: Damon O. Holmes.

DUTIES/POWERS: Typical cases include: late and missing refunds; faulty billings; Social Security number mixups; taxpayer errors; and hardship relief.

STATUS IN ORGANIZATION: Adjunct of commissioner's office; independent of operating bureaus. Ombudsman's rank, access to commissioner contribute to authority of office and programs.

1. THE TAXPAYER OMBUDSMAN

Taxpayers and tax collectors, if not natural enemies, are often combatants. Because the levy and collection of taxes is dispute prone, the Internal Revenue Service offers a likely setting for an ombudsman, some one to hear taxpayer gripes and who is empowered by law and a sense of fair play to intervene with the tax collector before the harm done to the taxpayer is magnified by neglect, indifference, or by a bureaucratic affront.

While the origins of the taxpayer ombudsman are a bit murky, it appears that there was a move afoot in Congress in the mid to late 1970's to establish an office outside of the IRS to handle the mounting number of complaints about the IRS. The idea was that the office needed to be independent of the IRS to work effectively. Jerry Kurtz, IRS Commissioner from 1977 to 1980, sought a means to meet the concerns expressed by Congress. Against this background, Kurz proposed and strongly supported the creation of an internal ombudsman as an adjunct to the Commissioner's office to deal with taxpayer complaints.

Before the Ombudsman's office was established, a program to deal with taxpayer grievances, known as the Problems Resolution Program (PRP), was initiated on an experimental basis in four Districts (Detroit, Milwaukee, Dallas and Austin) in 1976.[50] A year later, in 1977, the program was implemented on a national basis on the strength of the 1976 test run and the evaluation of the test results in September 1976 at a conference of Regional Commissioners and national office officials.[51] The evidence showed that the program not only helped taxpayers with their immediate problems (its basic objective), but also "provided a highly effective indicator of new, persistent or systematic problems and, if properly structured, could function as an early warning system to detect, measure and focus attention on major problems soon after they arose."[52]

The goals of the PRP are spelled out in "Operation Link," a pamphlet distributed to tax preparers and interested members of the public as part of the effort to inform the public about the existence and nature of the ombudsman service:

> 1. To assure that individual taxpayers are afforded an independent, monitored system for the resolution of problems that have not been resolved through regular organizational channels.

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[50] To test which organizational arrangement worked better, the Problem Resolution Office (PRO) was located in the Taxpayer Service Division in Austin and Milwaukee and in the immediate office of the District Director in Dallas and Detroit. The test showed that the PRO staff was more likely to intervene on behalf of taxpayers in examination and collection proceedings when located in the Director's office. On that basis, it was decided to place the PRO in the Director's office when the program was instituted nationally the following year. IRS paper (no author given), *Problem Resolution Program*, (1986 ?).

[51] Id. p. 5.

[52] Ibid.

> 2. To . . . identify recurring internal systemic and procedural problems . .
>
> 3. To serve as an advocate for taxpayers within the IRS . . .[53]

A. Organization/Place in Agency Structure

The Taxpayer Ombudsman reports to the Commissioner of the Internal Revenue Service.[54] He is a member of the Senior Executive Service, a high ranking career official who directs a national office staff of some 20 persons, including two teams of program analysts.

The current holder of the office is Damon O. Holmes, appointed in December 1987. He and his staff are responsible for the development and operation of the national PRP. They wrote and now maintain the PRP operating manual,[55] review the reports of the problems encountered in the field to identify those that recur or emerge as a result of the constantly changing nature of the Internal Revenue Code, seek solutions, and stand as the advocate of the interests of the taxpayers as the IRS develops new rules, forms and procedures for the imposition and collection of taxes.

The 300 or so persons who make up the national PRP staff are located in the 10 Service Center, 63 District, 7 Regional offices and the Washington office of the IRS. Each District Office has at least one person in the PRP function, although in some of the smaller offices (e.g., Burlington, Vermont and Portsmouth, New Hampshire) the PRP person may also serve as the public information officer.

Each PRP office throughout the country "is organized as an operational part of the Director's office" to assure its "independence from operational activities."[56] The separation allows the PRP staff to review the office's action on a particular problem without first having to persuade the head of the function that an error was made in a particular case. Field staff members look to the regional and national office staffs for guidance, moral support, and advice on uniform application of program procedures.

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[53] *Operation Link*, IRS Publication 1320 (Rev. 12/87), p.1.

[54] See the IRS Organization Chart, Appendix D.

[55] The basic PRP Manual, is Internal Revenue Manual 1279, *Problem Resolution Program Handbook*. It was first issued in 1979 and hs been updated periodically. It provides detailed instructions for dealing with all of the ordinary and many of the more esoteric problems the PRO staff is likely to encounter.

[56] *Internal Revenue Manual*, op. cit. *supra*, fn. 55, Chapter 200.

B. Scope of the Taxpayer Ombudsman's Authority

The Taxpayer Ombudsman is unique in at least one important respect: originally created by order of the Commissioner, i.e., as an executive ombudsman, the ombudsman and some of the duties and powers of the office have been recognized by the recent Omnibus Taxpayer Bill of Rights.[57] As a result, the office is now, at least in part, a creature of Congress as well.

The Subcommittee on Oversight of the Committee on Ways and Means of the House of Representatives conducted a study of the Problem Resolution Program in 1978. At that time the national office functions of the program were conducted by the Taxpayer Communications Branch of the Taxpayer Service Division under the direction of a Coordinator, an official four levels beneath the Office of the Commissioner, "a level too low to even report directly to the Director of the Taxpayer Service Division."[58] The Subcommittee also noted its doubts that the Taxpayer Communications Branch had sufficient management experience to carry out the program.[59] These concerns contributed to the decision made in 1980 to appoint a Taxpayer Ombudsman who would report directly to the Commissioner and to the decision to move the national office into the Commissioner's office.

Once the Taxpayer Ombudsman and his staff were in place, questions arose as to the nature and extent of the program's authority to stay decisions by the collection, examination and other enforcement functions while a complaint was being investigated and mediated. Indeed, many complaints grew out of the taxpayer's inability to maintain the status quo pending the outcome of the dispute. PRP was empowered by the Commissioner to order the status quo be maintained, if, in the opinion of the PR officer on the case, that step was justified. This was accomplished by issuing a Taxpayer Assistance Action (TAA) directing the enforcement office to stay further enforcement pending the outcome of the complaint. A weakness in the program, from the taxpayers' point of view, was the power of the enforcement officer to countermand the TAA. When that happened, it was up to the PR officer to persuade the director that the TAA should be reinstated. The 1988 Omnibus Taxpayers Bill of Rights reversed that burden by giving the Ombudsman and the PRO's the authority to issue Taxpayer Assistance Orders (TAO's). Under the law as it now stands, it is the enforcement officer who must appeal to the director to lift the stay provided by the TAO .

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[57] *Techical and Miscellaneous Revenue Act*, Pub. L. No. 100-647, Title VI, Subtitle J, Nov. 10, 1988.

[58] *Report on IRS Problem Resolution Program for Handling Taxpayer Complaints*, Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, Committee Print 95-74, p.36, 95th Cong. 2nd Sess., April 26, 1978. (Hereafter *Committee Print*.)

[59] *Committee Print*, op. cit. supra, pp.32-36.

The 1988 law created additional powers for the ombudsman and rights for the taxpayer. The law provides that taxpayers may apply to the ombudsman for a TAO, and authorizes the ombudsman to issue it if he determines that "the taxpayer is suffering or about to suffer a significant hardship as a result of the manner" in which the tax laws are being administered.[60] The TAO may be used to release property subject to a levy or to stop or set aside a collection action. The Omnibus Taxpayer Bill of Rights also requires the Taxpayer Ombudsman to make an annual report to Senate Finance Committee and the House Ways and Means Committee "regarding the quality of taxpayer services provided," a report filed jointly with the Assistant Commissioner for Taxpayer Services.[61]

C. Modus Operandi

The PRP operates much in the manner of a traditional European ombudsman. The PR officer does not work on the underlying tax problem, but investigates to determine the facts and then, on the basis of the facts (and applicable tax law), makes a recommendation on how to deal with the complaint. Damon Holmes, the current ombudsman, emphasizes the importance of getting the facts right as a predicate for the PRP recommendation. Usually, the PR officer's decision will be determinative, at least in those cases where the result is favorable to the taxpayer. While a result adverse to the taxpayer does not foreclose the taxpayer from other forms of review provided by the tax laws, it may be taken as dispositive, particularly in those cases where the PRP officer has gained the taxpayer's confidence.

The systematic collection of data from the field about the types of problems that recur or which are created by a change in the tax law is essential to the ombudsman's efforts to help reduce the bugs in the tax collection process. Because the field PRP staff hears daily what those problems are, the reports from the field provide the ombudsman, and through the ombudsman, the Commissioner and the Commissioner's senior staff, the information they need to identify and ultimately rectify problems. Feedback from the District PR officers offers the Commissioner direct access to the front line experience, and provides information that is often more meaningful than that which filters up through the functional division bureaucracies.

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[60] *Technical and Miscellaneous Revenue Act*, Pub. L. No. 100-647, Section 7811, Nov. 10, 1988..

[61] *Id.* at Section 6236.

The relationship between the Commissioner and the ombudsman varies somewhat according to the management style and backgrounds of the persons involved. When it works best, the Commissioner has at hand a ready and steady source of information and insight about the workings of the agency, and about the places where trouble shooting or broader reforms are needed. The ombudsman's office is across the hall from the Commissioner's office. This is important not only for what it says about the ombudsman's status, but also because it makes it possible for the two to consult easily.

2. CASE WORK

A. Clients/Users

The taxpayers and their representatives (one estimate is that just under 50% of all tax returns are prepared by professional tax return preparers),[62] are the primary users of the PRP. Members of Congress refer cases to PRP on behalf of their constituents.

B. Nature of Cases

The most common problems handled by the PRP "involve missing refunds, mixed-up Social Security numbers, incorrect billings by IRS, and mistakes made by the taxpayers."[63] Many problems start with mistakes taxpayers make in reporting their income, filling out their returns and in meeting filing deadlines. In FY 1989, in nearly 65% of the cases handled by PRP, the taxpapyers had made some type of mistake that lead to the problem. However, if IRS failed to resolve these problems or compounded them by making other errors, the cases became eligible for PRP assistance. IRS errors that led to the need for PRP intervention were commonly made during processing of items or payments, or failing to answer mail from taxpayers.

The enactment of the Omnibus Taxpayers Bill of Rights has led to a high volume of requests for Taxpayer Assistance Orders.

C. Acceptance Criteria

The IRS holds out PRP as the avenue of last resort for a taxpayer with problems. Direct appeal to the program in the first instance would bypass the functional offices and put unreasonable demands on the limited PRP staff. To deal with this problem the program has developed the following set of case acceptance criteria to qualify a matter for PRP control:

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[62] Interview with Patricia Burton, EA, of the National Association of Enrolled Agents, September 12, 1989.

[63] IRS News Release 89-N1.

> 1. Refunds. PRP intercedes if refund has not been made within 90 days after the refund claim was submitted and the taxpayer has made two or more inquiries about its status after 90 days.
>
> 2. Requests for Information or Assistance. PRP steps in after 45 days elapse without a response.
>
> 3. Notices. PRP handles notice cases[64] after taxpayer fails to obtain satisfaction from his or her response to the first two notices on the subject.
>
> 4. Access to Higher Authority. The taxpayer is entitled to ask that a superior review a position taken by the staff member on the case. PRP steps in where access to that person is blocked.
>
> 5. Other Problems. PRP retains discretion to take other cases if to do so is necessary to unclog a bottleneck or it is otherwise considered to be in the interest of the IRS to do so.

Cases excluded from PRP include those subject to an established administrative or formal appeal; those in which an appropriate response has already been provided; those within the jurisdiction of another agency of government; matters subject to the jurisdiction of the Criminal Investigation Division; matters involving a tax protest or a refusal to pay a tax due; and those cases which do not involve tax administration (e.g., personnel matters, disclosure and inspection questions).

D. Case Load

PRP currently handles approximately 400,000 cases a year, down somewhat from the 500,000 cases taken on in 1985, a year when delays in making refunds increased taxpayer frustrations and the case load. When a case meeting the PRP acceptance criteria is identified, it is assigned to a PRP caseworker in a District or Service Center office who handles it to its conclusion. That person contacts the taxpayer and becomes the taxpayer's contact for the duration of the complaint. This not only cuts the red tape and the need to explain the matter again each time the taxpayer calls, but also assures that at least one person at the IRS office knows what is going on with the complaint. Moreover, the PRP caseworker assigned to the case works with the enforcement or other IRS staff member to make sure that the case is handled within the program's processing guidelines.

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[64] "Notice case" is short hand for a matter in which the taxpayer has received a written notice from the IRS calling on the taxpayer to file additional information or take some other step in connection with the tax return in question.

Passage of the Omnibus Taxpayer Bill of Rights led to an increase in the number of requests for Taxpayer Assistance Orders from 50 per week to 300 per week. By the end of February, 1990, PRP had handled 17,700 cases involving requests based on hardship factors.

E. Settlement Rate

Of the 17,700 applications for TAO's received, only 9,900 were hardship cases. Of these, PRP was able to provide relief to the taxpayer in 73% of the cases. Enforcement issues comprised 48% of the cases with significant hardship. The remaining 52% were accelerated refund requests or other requests. Of the 7800 applications that did not show significant hardship, 71% were worked as PRP cases or were forwarded to a function that could help the taxpayer.[65]

The objective of the Problem Resolution program is to close 70% to 80% of its cases within 30 days of receipt. A case is regarded as over age if it is still open after 30 days. The program collects data on the 7-day settlement rate and the 30-day settlement rate.[66]

3. OUTREACH MECHANISMS

A. Printed Materials/Hotlines

"Operation Link" is the name given by PRP to its effort to improve communications between the IRS and tax practioners. It is described in program handouts.[67] It contains the addresses of the Problem Resolution Offices in each of the Service Center and District offices where practitioners may send information alerting PRP to a chronic problem or a case that cannot be resolved through normal channels. The phone number of each PRP District office is also listed in local telephone directory. The Problem Resolution program is described in the booklet of instructions the IRS sends out with tax return forms.

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[65] Figures furnished by the Taxpayer Ombudsman.

[66] In FY 1989, 38.6 % of cases were closed in 1-7 days and 89.5% were closed in 1-30 days. Figures furnished by Taxpayer Ombudsman.

[67] Appendix C contains a copy of the *Operation Link* pamphlet published and distributed by PRP.

B. Meetings with Users

PRP meets with practitioner groups around the country to explain the program and to take suggestions for making it more effective and more accessible.

C. Referral Mechanisms

Referrals come from the functional offices of the IRS, from state and local government agencies, and from members of Congress and other elected officials.

4. SPECIAL PROBLEMS

A. Lack of Authority over Budget

As an adjunct of the Commissioner's office, PRP is included in the Commissioner's budget, a constraint that works against adequate funding according to some of the staff. For example, the PRP data collection program is outdated and needs to be overhauled and upgraded. As a result, many professionals on the program's data processing staff have left the agency for more challenging and better paying jobs elsewhere. These problems deprive the IRS and the nation's taxpayers of the advantages of an up-to-date data collection and processing system.[68]

B. Career Advancement

Service as the ombudsman has advanced, not blocked, the attainment of career objectives by the earlier holders. Each of the first three occupants of the post subsequently was named to head an office which they regarded as attractive.

In the abstract, some PRP professionals worry that resentments formed by co-workers who are on the receiving end when PRP intervenes on behalf of a taxpayer will work against them if, as many do, they return to a job in one of the operating functions of the IRS. It may be that this happens now and then. However, it seems to be the case is that such resentments, if any are formed, are muted by the reputation PRP personnel have developed for fairness and the quiet, we-are-all-in-this-together approach they are encouraged to take in handling errors when they find them.

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[68] The problem is not limited to PRP. On January 10, 1990, *The Washington Post* reported that a year-long investigation by the House Ways and Means Committee found that the self-enforcing system of collecting taxes is in jeopardy for lack of funds. The IRS, according to the news account, is "unable to modernize its aging computers and [is] suffering severe shortages of such office supplies as pens and pencils." Article, *Hill Report Depicts IRS As a Hobbled Behemoth*, *The Washington Post*, January 10, 1990, p. A17.

5. ASSESSMENT OF PRP

A. Within Agency

Our interviews were conducted with members of the PRP staff in Washington and in the New York regional office, and with the Senior Deputy Commissioner of the IRS, Michael J. Murphy. The people who work in the program, at least in its upper levels, hold the program in high regard. They consider their mission extremely important to the creation and maintenance of taxpayer acceptance of the federal tax collection system. If high morale and love of task are any indication, the program is well regarded by those who run it. Deputy Commissioner Murphy stated that the PRP program generates most of the favorable mail the IRS receives.[69]

B. At Other Government Agencies

The General Accounting Office reviewed PRP in 1987 in response to a request by three members of the United States Senate.[69] By and large, GAO found that the program worked well in providing special assistance to taxpayers, but less well in identifying taxpayers who were qualified for special assistance in the first place.[70] The effect of this shortcoming was to increase the number of taxpayers who are not satisfied by the IRS handling of their complaints. The GAO report shows that 62% of taxpayers who receive special assistance are satisfied with the handling of their complaint compared with 23% who did not receive special assistance.

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[69] The report, *Tax Administration: IRS Can Improve on the Success of its Problem Resolution Program*, Report to Congressional Requesters, GAO/GGD-88-12, December 1987, was requested by Senators John Heinz (R.-Pa.), Bob Packwood (R.-Or.) and William V. Roth (R.-De.).

[70] *Report, supra*, p.31.

C. By Users

The user assessment we received indicates the program works the way it was intended. The fact that there is a trained, available PRP officer in every IRS office provides practitioners and the public with a means to question a troublesome decision by operating staff. As a result, in many, although probably not all, offices the operational people have an incentive to meet the objection before the PRP is called in to assist the taxpayer. If there is a reservation, it is that the program is still not widely enough known to be available in all the cases in which it might legitimately be used.

D. By Congress

PRP is, as indicated at the outset, at least in part, a creature of congressional concern about the way taxpayers are treated by the IRS. The Oversight Subcommittee of the House Ways and Means Committee is the principal PRP watchdog on the Hill. Of all the persons we talked to about the program, the Subcommittee staff expressed the most reservations. The reservations concern what might be (but is not) achieved by the program, rather than the quality of current PRP operations. The staff favors an expanded program, reflecting tension between executive and legislative budget priorities.[71]

6. CONCLUSION

The Taxpayer Ombudsman and the PRP staff demonstrate that a system as complicated as the levy and collection of federal taxes can be significantly improved by the establishment of a grievance bureau to address the legitimate complaints of the taxpayers arising out of their dealings with the agency.

B. The Army Materiel Command Ombudsman

TYPE: Executive. Created by agency order in 1984.

THUMBNAIL DESCRIPTION: Responds to and investigates complaints arising out of the Command's procurement functions for the Army; also has whistle blower jurisdiction. Object: to cut red tape; provide central complaint handling mechanism. Office has one secretary. Ombudsman makes up work parties for each case, as necessary, drawing on technical, legal and contract/procurement staff members to work with him. High success rate.

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[71] See [fn. __, *supra*], which may explain, at least in part, the problem.

Small staff (even with tasking authority as needed for particular cases) probably cuts down on the number of cases office can handle.

CURRENT HOLDER: Lewis J. Ashley.

DUTIES/POWERS: Cases include unfair exclusions or limitations; murky or out-of-date bid specifications; appeals from subcommand procurements. Handles about 80 cases a year.

STATUS IN ORGANIZATION: Adjunct of commanding general's office; speaks for him on matters considered by ombudsman.

1. THE AMC OMBUDSMAN'S OFFICE

The Army Materiel Command (AMC) is one of the five major commands that make up the Army.[72] It is responsible for supplying the Army, that is, with obtaining the weapons, vehicles and other equipment the Army uses. AMC spends approximately 60 percent of the Army's budget. It has 114,000 personnel stationed at posts in 43 states and some foreign countries. Its operations bring it into daily contact with hundreds of concerns that do business with the Army. Inevitably, snags occur in the process.

In 1984, at the time he took office as Commanding General, General Richard H. Thompson proposed using an ombudsman to handle problems arising out of the Command's dealings with industry. When he put this proposal to his senior staff they voiced objections. They thought it would duplicate existing trouble shooting mechanisms, be unduly intrusive, and create overlapping responsibilities. General Thompson was not dissuaded, however, and elected to try it. His judgment has been vindicated. The AMC ombudsman has won the respect of the command and the businesses with which it deals. The accomplishments of the AMC ombudsman provide a convincing demonstration of the utility of establishing an ombudsman in any case where a government agency has extensive dealings with the public.

A. Organization/Place in Agency Structure

General Thompson began by finding the person he wanted to be his ombudsman. From a field of some 40 candidates, he selected Lewis J. Ashley, a person with an extensive background in defense acquisition matters gained from stints on the Senate Armed Services and Budget Committees, and prior Pentagon and Department of Energy jobs. He joined AMC in 1982 as leader of the Ground Combat Systems Team and Manpower and Force Structure Teams. As ombudsman, Ashley's first task was to prepare the charter for the new office and a plan to implement it. Both were accepted by General Thompson and the charter has served to define the mission ever since.[73] The ombudsman reports directly to the Commanding General, and speaks for him on matters within his domain.[74]

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[72] There are also two commands for overseas operations, a training command and the forces command which is responsible for assigning trained personnel to the units in which they will serve.

The original plan contemplated the addition of an assistant as the case load grew. When that occurred, Ashley declined the assistant on the ground that he had better know first hand everything that was going on in his shop. Today, as then, he operates by himself with the assistance of one secretary. Rather than create a staff of his own, he has delegated to him the Commanding General's tasking authority. With it, Ashley may draw on the specialists he needs to help him work up a case. A typical working party includes a lawyer, and procurement, quality assurance and production section specialists, with others as circumstances may require.

B. Authority/Scope of Duties/Limits on Power

The goal of the office is to help the command's numerous suppliers cut through the layers of red tape characteristic of a large government organization, by providing a fixed point of contact at the top level of the command.[75] The ombudsman concentrates on external complaints about the workings of the command: e.g., confusing procurement documents, ineffective or unfair contract administration, delays in dealing with requests for clarification or relief. He acts as a confidential intermediary in cases where a contractor is worried about offending a customer, and oversees the command's whistle blower program. One of the more important facets of the office is to keep the Commanding General informed of the major complaints lodged with his office (what Ashley calls providing "heads up" reports to keep the CG up to date on the status of hot potatoes). The AMC ombudsman also has responsibility to review and evaluate the effectiveness of the command's programs and to recommend changes as needed. As a matter of practice, he stays out of areas where other systems have been set up to handle internal problems. For example, he does not deal with internal personnel complaints.

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[73] *AMC Ombudsman Charter*, February 20, 1985. [See Appendix E for text.] The Charter spells out the authority and responsibilities of the ombudsman, defines the mission, staff, location, chain of command and the operating concept for the office, and provides for the ombudsman's access to records and information.

[74] Ibid. The Charter provides that "the Ombudsman will report and be accountable only to the Commanding General." *Charter*, Section I.

[75] In the press release announcing the creation of the Ombudsman, General Thompson was quoted as saying "The Ombudsman's objectives are to cut through organizational red tape and to . . . actively promote AMC's capability to be open, responsive and fair, and to aid in improving the command's problem solving process." Release No. PR-5, April 11, 1985.

C. Modus Operandi

Ashley takes a hands on approach to the problems he accepts. He acts as a mediator between the contractor and the command office involved, seeking an outcome that is satisfactory to all concerned. The ombudsman's work party begins by assembling the facts.[76] If the work party decides that the command was out of line, Ashley proposes a solution that corrects the mistake or oversight. The Charter directs him to remain involved "until every reasonable attempt has been made to resolve the issue."[77] Where he finds that the command has acted properly, he lays out the pertinent facts and seeks to persuade the complainant that the proper result was reached. Ashley has the authority to hold up a procurement pending his investigation, and may require that the procurement be readvertised if the initial effort was flawed.[78] He is empowered to"(d)irect corrective action in the name of the CG, AMC when [he] determines it to be necessary."[79]

Once the ombudsman decides to take a case, he assembles the work party (ad hoc group) which will conduct the investigation and recommend the steps, if any, to correct the problem. The process may take a few hours in a simple case, but is more likely to take several days over the course of a few weeks depending on deadlines, case load, the time required to collect and examine essential information and other time constraints. The work party talks with the procurement officer involved, examines the procurement documents, reviews the procedure followed for fairness and compliance with procurement regulations, and may talk with the complainant's representatives before reaching a result. In one case, a large business that regularly supplied a certain item complained that the small business set aside announced for a new five-year, $700 million reprocurement effectively precluded the established supplier from competing. After an investigation, the work party agreed and the Request for Procurement (RFP) was changed to expand the competition.

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[76] The Charter gives him unlimited access to the command's records (within specified limits on access to classified material) and to make unannounced visits to any organization or staff within the command. *Charter*, Section VII.

[77] *Charter*, Section IV.B.1.c.

[78] In one case, for example, a new bidder complained that the specification for an item of equipment was so out of date that it restricted competition by favoring a type of product that had not kept pace with market advances. The ombudsman's investigation substantiated the complaint, the solicitation was cancelled, and the specifications for the item changed to incorporate current technology in subsequent procurements. This is a summary of a case history reported in the *Ombudsman Corner* of the November, 1988, issue of PERSPECTIVES, a quarterly publication of the AMC Public Affairs Office.

[79] *Charter*, Section IV.B.1.f. On its face, this provision appears to empower the ombudsman to substiute his judgment for that of the line official whose decision is being considered, authority not normally placed in an ombudsman. In fact, the power is rarely utilized, and then only to maintain the status quo pending further investigation and/or action by the Commanding General. Telephone interview with Lewis J. Ashley, April 18, 1990.

2. CASE WORK

A. Clients/Users

The Charter provides that members of the general public, Government agencies, industry and the private sector may apply to the ombudsman for assistance.[80] Currently, large businesses account for 43% of the requests for assistance the ombudsman receives, small businesses for 57%.

B. Nature of Cases

Most of the cases deal with complaints that the AMC has failed to exercise proper judgment or to follow federal procurement regulations or practices. Examples include cases where a procurement specified unnecessarily restrictive specifications or where a procurement contract was alleged to have been improperly awarded, cases where the technical data or other bidding information is flawed in some way and cases where actions appeared arbitrary, or involved inordinate delay. The ombudsman also handles complaints about the manner in which parties were dealt with by AMC, such as situations where contractors have asked for and been refused clarification or explanations, or have been treated discourteously.

The AMC ombudsman also has jurisdiction to hear complaints from "whistle blowers."[81] These cases involve allegations of waste of funds, mismanagement, rule violations, and instances where there may be a substantial or specific danger to the public health or safety. The ombudsman may set up an ad hoc group to deal with a whistle blower matter or refer it to the appropriate inspector general's office.

C. Acceptance Criteria

Any case which has been considered by the appropriate authorities in the 10 subcommands in which the complainant considers the outcome is unsatisfactory and which is not the subject of a General Accounting Office or court action is eligible for the ombudsman's attention.

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[80] *Charter*, Section IV.B.1.a.

[81] *Charter*, Section IV. B. 1. e. This section provides that the ombudsman will serve as the AMC point of contact on whistle blower actions, and "refer such matters to the appropriate organization, monitor their progress and take other action as he determines to be necessary and appropriate."

D. Case Load

The office handles about 80 cases a year. As Ashley defines it, a case is a request or complaint that takes substantial effort and time to resolve. Ashley says it usually takes a week or more to work through a case, and may take longer depending on the complexity of the case and the time required to investigate. Requests for information and the like are classified as "contacts" and are not included in the case load.

E. Settlement Rate

At the time he talked to us, Ashley stated that no party to a matter his office had handled had seen fit to take the matter to higher authority after the matter had been resolved by the ombudsman.[82]

3. OUTREACH

General Thompson announced the establishment of the ombudsman in meetings with industry groups, by press release and in letters to the chief executive officers of major defense contractors. The letter invited them to contact the Ombudsman "in the event you have any areas of concern which need my attention."[83] In addition, Ashley has used press releases, the Ombudsman Corner column in Perspectives, a newsletter distributed to industry,[84] and talks at trade association meetings to describe the office and invite those with problems to use it. He has prepared a talk illustrated with transparent slides to describe his office and the functions it performs. Referrals from companies that have used the office, and from Defense Department and other government staff persons familiar with it, also account for part of the case load. Up to now, there has not been a toll free hot line to the ombudsman, but, according to Ashley, this does not seem to have reduced the number of calls on the services of the office.

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[82] Interview with Lewis J. Ashley, August 23, 1989.

[83] Letter, April 12, 1985. The one furnished to us is addressed to John R. Opel, the Chief Executive Officer of International Business Machine Company.

[84] See footnote 79, *supra*.

4. SPECIAL PROBLEMS

The AMC ombudsman, like the former Ombudsman for Business in the Commerce Department, was created by agency order. It can be dismantled in the same way, and just as quickly. That means that the ombudsman must re-establish the need for the office every time the command changes at AMC.[85] The respect with which the office is held has so far been sufficient to assure its continuity. Whether the next ombudsman will be held in the same regard as the present one, and whether future commanding generals will elect to continue the program in its present form are open questions.

One reason for Ashley's success appears to be his demanding work habits. He tends to work 12-hour days and often takes active case files home with him for weekend and holiday work. It is his view that he should be available when needed. This degree of dedication is bound to be wearing and hard to duplicate in future appointments. The accomplishments of the office are such that it would appear appropriate to consider expanding the staff, not only to train others in the event Ashley is spread too thin or otherwise becomes unavailable at any particular moment, but to make sure that all of those who wish to make use of the service find it available. As matters now stand, Ashley appears to have his hands full without actively encouraging greater demand for the service.

As pointed out in the next section, action is underway to replicate the ombudsman function at each of the 10 AMC subcommands. Once these subcommand level ombudsman are in place, there will be the means to increase the case load, and to train potential headquarters staff. With the addition of the new officials, it seems likely that the headquarters case load will continue to expand as the defense budget contracts and the competition for the reduced business increases.

5. ASSESSMENT

A. Within Agency

If, as we are fond of saying, imitation is the purest form of flattery, there is evidence that the AMC ombudsman has won acceptance in an agency where all the senior staff were initially skeptical. Two of the 10 AMC subcommands have established ombudsmen at that level because the commanding officers there wanted to duplicate the headquarters program. If these trials work out, the AMC's plan is to put an ombudsman in each of the other eight subcommands.

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[85] There have been two changes of command at AMC since the ombudsman was created. The most recent occurred in October, 1989. Neither successor to General Thompson has made any changes in the Ombudsman Charter or in any other aspect of the operation.

B. At Other Government Agencies

Both the Air Force and the Navy have materiel commands. At the time Ashley was interviewed for this study, the Air Force was considering establishing an ombudsman. The Navy was not.[86] Today, the Air Force is experimenting with an ombudsman program at each of its subcommands.

C. Among Users

Apart from the success rate data discussed above in the Settlement Rate section, we have no data showing how the office is regarded by the businesses that have used it.

6. CONCLUSION

The AMC ombudsman was created on an informed hunch by General Richard H. Thompson as he was assuming command. If the office has not performed a minor miracle, it has come close. The record shows what can be done to cut red tape by a person with high motivation and skill backed by real authority from the top. General Thompson began by finding the person he wanted to be his ombudsman.

C. Department of Health & Human Services Supported State Long Term Care Ombudsmen

TYPE: Legislatively mandated (1978 Comprehensive Older American Act Amendments). Supported with federal funds, decentralized, implemented at the state level by the State Unit on Aging.

THUMBNAIL DESCRIPTION: Federal grants made in 1972 to selected states helped to develop test ombudsman programs in and for nursing homes. Legislatively extended to all states in 1978 Comprehensive Older American Act Amendments. Expanded in 1981 legislation to include board and care homes, in addition to nursing homes, requiring that any such long term care facilities receiving federal funds have an ombudsman.

CURRENT HOLDER: Depends on which state. Usually administered by the State Unit on Aging.

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[86] Ashley Inteview, August 23, 1989.

DUTIES/POWERS: Investigates and resolves complaints made by, or on behalf of, residents of long term care facilities. May also on occasion act as an advocate for the patient.

STATUS IN ORGANIZATION: Depends on state. Most ombudsmen are part of the state agency on aging but the duties of a few programs are contracted out. Ombudsman programs are independent from the facilities they monitor.

1. OMBUDSMAN PROGRAM

A. Organization

Nursing home care became a national issue by the mid 1970's with cases of abuse and neglect resulting in congressional investigations, hearings, and legislation. Evidence was presented that the frail and elderly in some long term care institutions who were most vulnerable and susceptible to mistreatment were at the mercy of staffs that were often inadequately trained, bored and sometimes even malicious. Isolated from their families and other outside support mechanisms, patients often were afraid of the consequences of speaking up.[87] Some who protested were ignored because they were said to lack the capacity to describe their living conditions accurately.

By the early 1970's many presumed that state governments were not adequately monitoring the nursing home industry. This, combined with the demographic fact that an aging population was a growing constituency, made it politically desirable to address these concerns.[88] Ombudsman were thought to be one means of redressing this imbalance of power.

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[87] A recent draft report of the U.S. Department of Health and Human Services concluded that abuse of nursing home residents often goes unreported and that there is no effective system to investigate complaints. The report goes on to say that more than half of the nursing home residents surveyed believe that abuse is rarely reported to authorities. It also states that 36% of nursing home aides witnessed a case of physical abuse of a patient in the past year, and 10% admitted to being the abuser. Reports of abuse rarely make it to the local police, as these types of cases are difficult to prove because most do not have third party witnesses. What investigations there are are likely to be conducted by the state ombudsman and medicaid fraud units. From, Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon. Dec. 18, 1989, p. C-15.

[88] The 1970's were also a time when the concept of advocacy for the disadvantaged was growing in popularity. By the early 1980's, there was a move to decentralize government services under the notion of "new federalism." This federal ombudsman program, implemented at the state, regional and local level, is viewed by some as the epitome of decentralization. Based on an interview with Eileen Bradley, Associate Commissioner, Office of Hearings & Appeals, Social Security Administration, Department of Health & Human Services, Thurs. Sept. 28, 1989.

In 1972, the Federal Department of Health, Education and Welfare (HEW) funded the development of experimental nursing home ombudsmen programs for four states and one national organization.[89] The plan was the brain-child of the Presidential Advisory Commission on Aging[90] and the Secretary of HEW Arthur Flemming[91] and was intended to investigate complaints of older institutionalized individuals about action adversely affecting their health, safety and welfare. In 1973, this program was transferred from the Health Services and Mental Health Administration of HEW to the Administration on Aging (AoA). AoA initiated the ombudsman development programs in all states through modest grants under Title IV of the Older Americans Act[92]. The 1978 Amendments to the Older Americans Act of 1965 intended that all nursing home facilities receiving funding from HHS would have an ombudsman. The scope of the legislation was expanded to include all board and care homes by the 1981 Keys Amendments. In 1988, there were 578 local recipients of federal funding for state long term care ombudsmen programs.[93]

Each state unit on aging may itself operate the long term care ombudsman program or may contract with another agency or independent nonprofit group to operate it. Each state submits its ombudsman program "state plan" to the federal AoA. Plans vary from state to state, depending on the identity of the plan administrator, access, statutory authority, scope, and staffing patterns.[94]

Since these state long term care ombudsmen must be independent to be effective, the law requires that they be sponsored by an office which is outside the system being monitored. Most state long term care ombudsman programs are housed in the Office on Aging, or elsewhere in state government, sometimes in large umbrella agencies which also operate the Department of Health.[95] Others are independent agencies reporting directly to the governor; and some states contract out their ombudsman programs to private nonprofit groups.

In Washington, DC, for example, the long term care ombudsman is not housed in the DC Office on Aging because this agency operates one of the nursing homes in the District. By contracting out the ombudsman function to private nonprofit organizations, the possibility of a conflict of interest was removed.[96]

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[89] Mailick, Mildred, "Chapter 9: The Ombudsman in Health Care Institutions in the United States," Caiden, Gerald E., Ed., *International Handbook of the Ombudsman: Evolution and Present Function*, Westport, CT: Greenwood Press, 1983, p. 122.

[90] Comments from Ann Weaton, Administration on Aging, April 20, 1990.

[91] Interview with Eileen Bradley-SSA/HHS, Thurs. Sept. 28, 1989.

[92] Comments from Ann Weaton, AoA, April 20, 1990.

[93] Ibid.

[94] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 122.

[95] Comments from Ann Weaton, AoA, April 20, 1990.

Each state must allocate a percentage of its AoA budget to the ombudsman program. Some states have allocated substantial additional funds to the ombudsman program. In a recent survey of a majority of state long term care ombudsman programs, federal funding accounted for approximately two-thirds of average funding.[97] Some states have responded to fiscal constraints by focusing on a limited number of nursing homes, restricting the geographic area they serve, or restricting the categories of complaints to which they will respond. The 1978 Older Americans Act Amendments broadened the definition of long term care facilities to include any skilled or intermediate care institution, nursing home, or other adult care home. Because of insufficient funding, many long term care ombudsman programs are only able to service nursing homes.[98]

The law also supports the training and use of volunteers and citizen organizations in the state long term care ombudsman program.[99] Most states have an average of three paid professional full-time staff in the state level ombudsman office.[100] The balance of paid and volunteer staff varies from state to state, but most programs depend on some nonpaid assistance. Other organizations, such as health consumer groups, organizations of relatives of institutionalized patients, residents' councils, state prosecutors, and regulatory agencies work with the ombudsman programs in surveying and controlling state long term care facilities.[101] Frequently, the professional long term care ombudsmen train the volunteer ombudsmen. One DC long term care ombudsman seeks to assign one volunteer to each nursing home floor.[102]

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[96] The DC State Long Term Care Ombudsman program is contracted out to the Office of Legal Counsel for the Elderly (which is part of the American Association of Retired Persons-AARP), a private nonprofit organization. Legal Counsel for the Elderly subcontracts for ombudsman services with three local private nonprofit agencies, one in each of the three districts that have nursing homes. One central ombudsman oversees these three district programs. The DC Council developed long term care ombudsman legislation, modeled after the federal legislation, but it has no control or oversight over the ombudsman. Based on interview with Vera Mayer, Long Term Care Ombudsman in the NW section of Washington, DC, Fri., Sept. 8 1989. (Hereafter "Mayer Interview").

[97] Based on a 1987 survey of 49 state long term care ombudsman programs, Title III compromised 61% of funding; other federal sources accounted for another 6%; NonOlder Americans Act state funds provided 27%; with another 6% coming from other nonfederal sources. See *Comprehensive Analysis of State Long-Term Care Ombudsman Offices*, National Association of State Units on Aging-NASUA, Sept. 1988, p. 19.

[98] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124

[99] Ibid.

[100] *Comprehensive Analysis of State Long-Term Care Ombudsman Offices*, NASUA, Sept. 1988, p. 15.

[101] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

B. Authority/Scope Of Duties/Limits On Power

The effectiveness of the state long term care ombudsman program often depends on whether it is run by a state agency or private contractor.[103] Operation by a private agency obviously affords independence from state control. While this may also eliminate some red tape, privately sponsored programs may increase problems of coordination, communication and cooperation with the state agencies which monitor them. Ombudsman programs operated by state agencies on aging or health may encounter still other problems if entrenched bureaucrats are not supportive. When the ombudsman program is run from the governor's office, it may gain in prestige, but will be more sensitive to political pressures. Nevertheless, this model is thought to be the most effective in that it is the most similar to the classic ombudsman model.[104]

The congressional mandate of the Older Americans Act Amendments requires that the community be involved in these long term care ombudsman programs. This is demonstrated by the degree of volunteer participation in the program.

This legislation also required that each state "establish procedures for appropriate access to long term care facilities and patient records,"[105] but does not specify what is meant by appropriate, leaving room for a broad range of interpretations.[106] In some states, the ombudsman has legal access to all facilities and records. In others, access is not guaranteed, and facility managers must consent to entry to the premises. When access is dependent upon the cooperation of the institution, ombudsman effectiveness and independence are compromised.

Access to patient records varies from state to state.[107] Some states allow the ombudsman to review patient records without restriction. Others interpret the law as requiring the written consent of the patient before giving the ombudsman permission to read records. While intended to safeguard the patient's privacy, the effect is to disclose to the staff that a particular patient has made a complaint. This conflicts with the intent of the law which is to protect the right of the patient to complain in confidence.

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[102] Mayer interview.

[103] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

[104] Ibid.

[105] *The Older Americans Act*, Pub. L. No. 89-73, 42 U.S.C. SS 3001 et seq. 1965; amended 1978, Pub. L. No. 95-478, #307 (a)(12)(B).

[106] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

[107] Ibid.

In one example, the Washington, DC City Council gave statutory authority to protect the confidentiality of its long term care ombudsman and her designees, providing freedom from liability and the legal basis to look at all records.[108] This state ombudsman also has the authority to go to court to gain compliance with the law.[109] In one case, the DC state ombudsman and the DC Corporation Counsel jointly argued in defense of a decision handed down by an administrative law judge which the nursing home facility appealed.[110]

State long term care ombudsmen confront many issues involving their authority. One involves the state long term care ombudsman's proper role in the nursing home licensing process. (Obviously an ombudsman who has a role to play in that process will have more influence with licensed facilities than those that do not get involved.[111]) Another issue is the adequacy of inspections. License inspections occur infrequently, as little as once a year. In the past, moreover, inspections were more comprehensive and included observations of the facilities' operations. Because of budget constraints, superficial inspections are not uncommon. After the Institute of Medicine's 1986 report, Congress attempted to incorporate its ideas into legislation. One of the reforms included training surveyers to interview residents and evaluate outcomes rather than relying on the facilities' documentation and written policies.

C. Modus Operandi

The ombudsman programs investigate complaints of older institutionalized individuals about action adversely affecting their health, safety and welfare; monitor the development of applicable laws, regulations and policies; provide information to public agencies about residents of long-term care facilities; and promote private organizations' and volunteers' participation in the ombudsman program.[112] The state ombudsman is also required to establish a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long term care facilities for the purpose of identifying and resolving significant problems.[113]

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[108] *District of Columbia Long-Term Care Ombudsman Program Act of 1988*, DC Act 7-293, Jan. 6 1989 a New Chapter 33 of title 6 of the DC Code.

[109] *DC Ombudsman Expands Powers: Official Assumes Role of Protector of the Aged in Private Facilities*, *The Washington Post*, Mon. Oct. 24, 1988, p. D-1.

[110] Mayer Interview.

[111] Ibid.

[112] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

For example, in DC, one long term care ombudsman goes from room to room to see patients, meets with their families, sits in on staff meetings, trains volunteers and has affected certain policy changes.[114] She utilizes a computerized intake form, developed by the State Ombudsman for use by the three local projects. She also keeps confidential notes, cross indexed by facility and resident's name.[115]

Ombudsman investigate complaints against facilities and alert the relevant governmental agencies to possible abuses. They also undertake their own investigations and attempt to resolve the underlying problems when issues of mistreatment are raised. The ombudsman acts as a problem solver, facilitator, liaison, and advocate for patients and their families with the institutions and governmental agencies.

Volunteer ombudsmen assist the professional ombudsman by gaining visibility for the program, building relationships, and serving as the link between patients, families and staff. They visit the facility on a regular basis, meet individually with patients, families and staff, and are often able to gain the trust of the patients. Volunteer ombudsman staff expand the reach of the program and act as a liaison to the community. Most handle the routine complaints and refer the more difficult problems to the professional ombudsman staff. Constant recruitment and training are required to maintain the pool of competent volunteers.

Complaints may be received directly from patients and their families as well as from staff during visits by the ombudsman. The ombudsman may also pursue independent investigations on-site. Complaints are received by telephone "hotlines" and correspondence. In those programs which depend on paid ombudsman staff and have these hotlines, complaints are logged and usually are responded to within a set period of time, usually 48 hours.[116] In many instances, the ombudsman often must gain the facility's consent before they can embark on the investigation.[117] Uncooperative operators can frustrate the investigation by withholding consent.

An investigation into a particular complaint involves several steps. These include making personal contact with the parties; completing consent forms for representation and release of records; identifying relevant issues areas raised by the complainant; collecting and assembling necessary facts; identifying applicable state and federal laws; interviewing staff; reviewing expert information; supervising volunteer investigators; communicating with the complainant to relay progress of the investigation; and developing and implementing a strategy to resolve meritorius complaints.[118]

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[113] *Older Americans Act* Sec. 307 (a) (12) (C).

[114] Mayer Interview.

[115] Ibid.

[116] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[117] Ibid.

In general, state long term care ombudsmen attempt to resolve problems at the lowest level of authority as possible.[119] This is done to protect the complainant from possible retaliation. Once a complaint is substantiated, it may be referred to the appropriate agency for legal action if other avenues fail.

Long term care ombudsmen are usually required to submit reports to the state ombudsman and the area agency on aging. All of the DC long term care ombudsmen prepare monthly reports, consisting of a computerized summary of complaints.[120]

2. CASE WORK

A. Clients/users

The primary users of state long-term care ombudsman programs are residents of nursing homes receiving federal funding and their families. The program is used less often by the staffs of such long term care institutions and is used by nursing homes administrators very rarely. The program mainly serves patients, but nursing home staffs may on occasion turn to the ombudsman to solve problems involving difficult patients and their families. Occasionally, representatives of advocacy groups for the elderly intervene in particular cases. Congressional interest in a particular case may occur as an outgrowth of constituent casework services. Officials from related state and federal agencies may also refer matters to the ombudsman in a particular problem case.

B. Nature of Cases

Complaints which are commonly within the ombudsman's jurisdiction involve the action, inaction, or decisions of providers of long term care, or their representatives, relating to the services of long term care institutions, public agencies, or of other social service agencies, which may adversely affect the health, safety, welfare or rights of such residents.[121] States may also investigate complaints made by a patient against a particular family member or other private individuals.[122]

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[118] *Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices*, National Association of State Units on Aging-NASUA, Sept. 1988, pp. 110-11.

[119] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[120] Mayer interview.

[121] *Older Americans Act* Sec. 307 (a)(12)(A)(1)

State long term ombudsmen deal with three types of complaints: quality of life issues, quality of care issues, and issues of patients rights.[123] Quality of life issues involve patient discomfort, either material ones or those resulting from staff conduct. Quality of care issues involve complaints about the quality of medical care, health care, or nutrition received. Infringement of rights cases deal with violations or limitations of patient freedoms, such as access to their funds, visitor restrictions, or reservation of rooms upon return from temporary hospitalization.[124]

The most common complaint is neglect of resident patients.[125] Complaints include residents who have been scalded by hot water when left unattended in hot showers; some who have been strapped to beds and chairs for too long; and others who not assisted to go to the bathroom. Other cases are more serious.

Institutionalization itself may give rise to complaints from patients. Sometimes patients cause themselves problems by failing to follow nursing home rules, e.g., regulations against smoking. Facilities sometimes fail to follow Federal and state procedures controlling the discharge of residents from the facilities or transfers within.[126] Complaints also arise when families of patients make unreasonable or insensitive demands.

Current issues facing state long term care ombudsmen include conflict of interest problems, nurse's aide training, patient transfers from one facility to another, boarding care homes, providing legal services to patients and rapidly changing federal laws.[127]

C. Acceptance criteria

State long term care ombudsman are generally not limited in the types of cases that are appropriate for them to address or refer. They have discretion to deal with a broad range of problems. Medical or legal experts may be asked to assist with a particular problem. The scope of clientele aided will depend to a large degree on the individual ombudsman, his or her caseload, and resources.

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[122] Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices, NASUA, p. 110.

[123] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[124] The Patient Bill of Rights codifies some of these rights.

[125] Anderson, & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Monday, December 18, 1989, p. C-15.

[126] Mayer Interview.

[127] Interview with Ann Lordeman, NASUA Senior Program Associate, Fri., Oct. 27, 1989.

D. Case load

In one year, there were 411 complaints recorded in one DC Ombudsman project.[128] During the same time frame, there were 596 complaints issued, 96% of which were fully or partially substantiated.

E. Settlement rate

In one year, 401 out of 411 complaints were resolved, 5 were not able to be resolved and 5 are still active.[129]

3. OUTREACH

A. Printed material

Some state ombudsman programs depend more heavily on paid than on nonpaid staff. These programs solicit complaints by using well-organized educational campaigns.[130] Some State Long Term Care Ombudsman distribute brochures and manuals describing their program services.[131] Others also post notices and posters about their role in the nursing homes. Long term care ombudsman usually submit reports to the state ombudsman and the area agency on aging.

The National Association of State Units on Aging (NASUA) in Washington, DC operates a National Resource Center for State Long Term Care Ombudsman, funded by the Administration on Aging. With the assistance of AoA funding, NASUA produced three resource publications for the state long term care ombudsman program.[132]

B. Meetings with users & others

Professional and volunteer ombudsmen visit the care facilities on a regular basis and meet with patients, families and staff.

These ombudsmen may belong to one of two professional associations devoted to state long term care ombudsmen. One is made up of the heads of state level ombudsman programs, the other of all those who operate at the local level, a majority of whom are volunteer ombudsmen. The local long term care ombudsman association sponsors workshops for training programs and information and referral services.

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[128] For the period between October 1988 and September 1989. Furnished by Vera Mayer, Iona House, NW DC Ombudsman, March 1990.

[129] Ibid.

[130] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[131] Mayer interview.

[132] *Comprehensive Analysis of State Long Term Care Ombudsman Offices*, *Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices*, and *Training Activities of the State Long Term Care Ombudsman Offices*.

C. Referral mechanisms

Families of patients often contact the state long term care ombudsman before placing a patient in a particular facility. Generally, however, the ombudsman is contacted after the patient becomes a resident and a problem has developed. Staff members often refer cases to the long term care ombudsman. Some nursing homes social workers and other professional specialists may refer cases to the ombudsman.

Those state ombudsman programs which depend more heavily on paid staff than on nonpaid staff also tend to invite complaints by using 24 hour toll-free hotlines.[133] These require greater effort on the part of the complainant than do the programs in which the ombudsman regularly visit patients. Programs with a higher proportion of professional staff tend to be more concerned with the few more serious abuses than with the regular day-to-day complaints.[134]

The state long term care ombudsman program often deals with several state agencies. State long term care ombudsmen often use written working agreements to clarify roles, coordinate services, and establish operating procedures with other agencies.[135] Most of these working agreements are with the licensing and certification units, usually in the state health departments.[136] In the District of Columbia, for example, matters are often referred to the Office of Adult Protective Services within the Department of Human Services, or to the Service Facility Regulation Administration within the Department of Consumer and Regulatory Affairs. An ombudsman may refer the more serious violations to the state licensing agency or the police.

4. SPECIAL PROBLEMS

A. Lack of uniformity among state programs

States have wide latitude in implementing the federal long term care ombudsman program. This results in marked disparities in the quality of states' programs. While this discretion allows states to adapt programs to local needs, standardized enforcement and evaluation are difficult to implement. One result is some loss of control by the federal agency which oversees the programs. However, the involvement of the community and congressional oversight tend to render state long term care ombudsman programs more accountable than they might be otherwise.

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[133] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[134] Ibid.

[135] Comprehensive Analysis of State Long-Term Care Ombudsman Offices, NASUA, p. 32.

[136] Ibid.

Even in cases where programs are similar, information sharing is limited to a few professional organizations and national associations (participation in these is not mandatory nor is it universal). Most of these associations have limited resources and therefore can not afford to focus their programs on this particular field. Not only is there difficulty coordinating programs between the federal and state level, but there is also a broader intergovernmental problem in coordinating between these levels and the local level.

B. State long term care ombudsmen often act as patient advocates

Many state long term care ombudsmen are not in fact neutral, as in the sense of the classic ombudsman model, but in practice act as advocates for the elderly.[137] For this reason, the ombudsman may occasionally need to call in a mediator or other third party neutral, to resolve a particular dispute. Some ombudsmen tend to justify this role on the grounds that the nursing home industry is politically powerful in many states.[138] Some state ombudsmen believe that many nursing home owners have the resources to make improvements but not the will to do so.[139] This suggests that ombudsmen may lack influence with long term care facility administrators.

C. Growing demand based on fiscal constraints and an aging population

Only five percent of the aged are in nursing homes at any one time, but much larger percentages will require nursing home care at some point in the future.[140] Most still live in their communities. Advancements in the medical field have resulted in the expansion of the average life span. As a result, the elderly are the fastest growing segment of the population. The number of senior citizens in this country is expected to double in the next 40 years.[141] Similarly, the nursing home population is expected to double between 1985 and 2020.[142] Even though there are more nursing homes now than ever before, the need will continue to increase.

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[137] Interview with Linda Work, National Institute for Dispute Resolution-NIDR, Monday, August 28, 1989.

[138] Interview with Eileen Bradley-SSA/HHS, Thurs., Sept. 28, 1989.

[139] Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

[140] Mayer interview.

[141] Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

Many nursing homes, moreover, are suffering from fiscal constraints. Aides are often undertrained, underpaid, and overworked. The current shortage of licensed nurses is another factor making nursing homes increasingly difficult to administer.[143] The complex regulations governing these facilities also contribute to the problem, in the absence of clarification of the interplay of the various levels of regulation.[144]

It is not surprising then, that there should be neglect of some nursing home residents. State long term care ombudsmen and their volunteers do not always have the staff to go door to door to check on patients and take other steps, that if routinely implemented, could improve service.

D. Limited Jurisdiction

Another problem in the long term care area are the approximately 40,000 licenced[145], and untold unlicenced, institutions known as "personal care facilities," that house individuals on public assistance, such as recipients of Social Security and welfare. These types of facilities generally have lower standards than those in which the long term care ombudsmen operate and therefore cry out for some type of ombudsman program. Such a program would need substantially more funds then currently provided to the state long term care ombudsman system but there are even fewer public resources available for monitoring operation of these facilities.

5. ASSESSMENT

A. Within Government

Although the state long term care ombudsman program is generally well liked within the U.S. Department of Health and Human Services, a recent draft report of this agency concluded that abuse often goes unreported and there is no effective system to investigate complaints.[146] This study may be pointing out the problem with trying to quantify ombudsman cases. How are abuses recorded? Do all cases neatly fit into the different complaint categories? This study could also be pointing to a resource problem. Conversely, it might be the case that the ombudsman program as originally designed cannot meet the demands of the growing long term care population in need of service. Those issues deserve closer attention then they have received, or than we can give them here. Meanwhile, long term care ombudsmen themselves believe that they often alleviate problems and thus stave off hardship and potential litigation.

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[142] Projected Population of Nursing Homes, in Millions (1989 data), "The Cost of Growing Old (Vital Statistics)," *The Cutting Edge: News and Notes About Health*, *The Washington Post* Health Section, October 3, 1989, p. 5.

[143] Mayer interview.

[144] Ibid.

[145] House Select Committee (on Aging?) Report, March 1989.

[146] Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

B. By Users

Patients who are institutionalized in nursing homes and other long term care facilities are often very dependent on the state long term care ombudsman system and appreciate having a spokesperson. The ombudsman program gives families some peace of mind that these institutions are being monitored.

Some staff appreciate the presence of the state long term care ombudsman at nursing home meetings because the ombudsman can provide a more objective perspective to administrators.[147] In this way, the ombudsman serves as a facilitator. The nursing home itself may look to the ombudsman to help resolve problems because of the independent position he or she holds. The role of the ombudsman may in unique situations be perceived as one of providing assistance to the nursing homes, and the function is not always resented by staff.

In some states, politically powerful nursing home lobbies can limit the effectiveness of the ombudsman's role.[148] Jurisdictions structured with ombudsman systems which are independent from monitoring state agencies are often not as sensitive to such political pressure.[149]

C. By Congress

Congress has been very supportive of the state long term care ombudsman program as it mandated its creation and continues to endorse it. Congressional staffs who receive cases from patients of long term care facilities, or their families, welcome the assistance an ombudsman provides constituents.

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[147] Mayer interview.

[148] Ibid.

[149] Ibid.

6. SUMMARY & CRITIQUE

It is difficult to generalize about a decentralized ombudsman program with so many variations. There is a clear need to give the ombudsman more statutory authority in those states where the right of access to the facility is not guaranteed. Some critics contend that state long term care ombudsmen are only effective in those institutions in which the officials being monitored are responsive to complaints.[150] Whether these critics are right or wrong, ombudsman programs are probably most useful and effective when they address less severe matters, with more serious ones being referred to the appropriate state officials or local authorities. Ombudsmen also serve to monitor and collect data on the conditions of facilities and are in a position to affect future policy. The existence of the state long term care ombudsmen probably acts as a deterrent to some abuses.

D. Environmental Protection Agency-RCRA Hazardous Waste Ombudsman

TYPE: Legislatively mandated.[151]

THUMBNAIL DESCRIPTION: The Hazardous Waste Ombudsman was authorized for a four year trial in 1984 as part of the Resource Conservation and Recovery Act (RCRA) amendments to the Solid Waste Disposal Act of 1976,[152] but the office was not organized until 1986. As a matter of Agency policy, the Ombudsman took on Superfund program issues including those arising out of the Underground Storage Tank, the Emergency Planning and the Community Right-to-Know programs as well.

CURRENT HOLDER: Robert Knox.

DUTIES/POWERS: Responds to complaints and inquiries from the public regarding regulations or technical matters arising out of the programs subject to his jurisdiction.

STATUS IN ORGANIZATION: Housed in Office of Solid Waste & Emergency Response. Ombudsman is a senior staff position. Office has one assistant and one secretary, little political clout or exposure. Ombudsman office oversees 10 regional ombudsmen who also serve as line staff.

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[150] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[151] Pub. L. No. 98-616; 42 U.S.C. Sec. 6917.

[152] Pub. L. No. 98-616.

1. OMBUDSMAN'S OFFICE

A. Organization/place in agency structure

The 1984 Resource Conservation and Recovery Act (RCRA) and the 1976 Solid Waste Disposal Act (SWDA), which it amended, strengthened existing federal laws which protect the environment and provided the framework for an extensive and complicated regulatory scheme. For example, the law prohibits dumping toxic materials from dry cleaning plants, filling stations, and pulp mills.

Compliance with these laws and regulations can be quite expensive, especially for smaller businesses. Larger business, on which local economies often depend, and local officials concerned about plant closings resulting from the enforcement of environmental laws, sought ways to reduce the scope and impact of enforcement. On the other side, environmental protection groups sought more vigorous and focused enforcement. Initial agency responses to the competing forces were sometimes confusing and often slow in coming. Citizens on both sides were left wondering if these laws were to be strictly enforced, delayed, changed or waived. Barbara A. Mikulski (D-Md.), then a member of the U.S. House of Representatives, received so many complaints from constituents who could not get clear answers on these environmental inquiries or prompt action on their requests for waivers, that she sponsored an amendment to the 1984 revisions establishing an ombudsman to handle these complaints.

Robert Knox, the Hazardous Waste Ombudsman, was appointed in 1986. His office is located in the EPA Office of Solid Waste & Emergency Response. Knox reports to the Assistant Administrator of the Office of Solid Waste & Emergency Response, the EPA bureau which deals with hazardous waste treatment, storage, and disposal; "Superfund" cleanup (the Comprehensive Environmental Response, Compensation, & Liability Act also known as CERCLA); emergency preparedness; "community right to know" programs; underground storage tanks; and energy recycling.

Each of the ten EPA regions has a regional ombudsman. The regional ombudsmen report to the Regional Director and not directly to the RCRA ombudsman who is nevertheless responsible for their training and coordination. All but one of the regional ombudsmen also serve in either program administration or public information positions.

The EPA program information hotlines, including one for RCRA, are operated by independent contractors, an incongruous situation which deprives the public and the agency of the benefits of integrating this service with the ombudsman's other functions.

Legislation was introduced in the House and Senate on the opening day of the second session of the current 101st Congress to make EPA a cabinet level department. The House version of the bill originally contained a section to establish an ombudsman within the Secretary's office. Although the ombudsman proposal had the strong support of the committee chairman, John Conyers (D-Mich.), it was removed from the bill as introduced to assure bipartisan support. As it passed the House, the legislation contained a provision calling for a study of the proposal to create a departmental ombudsman.[153]

B. Authority/Scope of Duties/Limits on Power

The RCRA ombudsman is a legislatively mandated position which arose out of dissatisfaction with the way the agency was responding to complaints from the public about the way the law was being administered. The ombudsman is intended to be the office of last resort to be used after the complainant has exhausted the remedies available through normal channels. The law clearly spells out his duties:

> "It shall be the function of the office of ombudsman to receive individual complaints, grievances, requests for information submitted by any person with respect to any program or requirement under this act.
>
> . . . [T]he ombudsman shall render assistance with respect to complaints, grievances, and requests . . . and shall make appropriate recommendations to the Administrator."[154]

Knox has access to agency records in the investigation of complaints.

As a matter of policy, the RCRA ombudsman [and each regional ombudsman] is instructed that,

> "[W]hile striving to be objective, the Ombudsman must remember that he or she is part of EPA's mission and thus, must work within EPA's system to address problems rather than standing apart and criticizing the Agency."[155]

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[153] H.R. 3847, *Department of Environmental Protection Act*, House Committee on Government Operations, introduced Tuesday, January 23, 1990 by Rep. Conyers.

[154] Pub. L. No. 98-616, Sec. 103; 42 U.S.C. 6917. The committee report accompanying this section stated that Congress expected the ombudsman to, "be of sufficient stature within the Agency that citizens will be able to secure meaningful assistance as quickly as possible."

[155] *Hazardous Waste Ombudsman Handbook*, Office of Ombudsman, Office of Solid Waste & Emergency Response, U.S. Environmental Protection Agency, pp. 1-4.

The law provides that the RCRA ombudsman "shall not effect any procedures for grievances, appeals or administrative matters"[156] under the regular channels.

C. Modus Operandi

The Hazardous Waste Ombudsman's office is housed deep in a corner of a cavernous office building in the area set aside for the Assistant Administrator for Solid Waste and Emergency Response. Because of the building design and the location of the ombudsman's office in the section of the building assigned to the program, the office is not easily accessible. This discourages walk-in traffic. Most cases originate by telephone calls, some through correspondence.[157] Knox engages in outreach functions, such as speech giving at technical professional association meetings, but most cases are referrals from satisfied users.

The ombudsman helps the public obtain information and locate the appropriate EPA office to handle a particular problem. Despite the apparent authority to do so, the ombudsman does not normally attempt to serve as a mediator or problem solver. Nor is he a spokesman for the public on issues raised by proposed rule and policy changes.

Knox responds to inquiries as received "over the transom" or from referrals from others who have used the service. The RCRA hotline deals with routine questions about the status of regulations, but when the contractor's staff is out of its depth the inquiry is referred to the ombudsman.

This ombudsman was given a good deal of discretion in designing the position. Knox sought to model his office after that of the IRS Taxpayer Ombudsman. For example, Knox uses the IRS Taxpayer Ombudsman's "self-correction" method of problem solving which encourages line staff to iron out the complaint, thereby allowing program staff to correct the problem without unnecessary interference by the ombudsman. Knox attempts to stay in touch with complainants as their case is being processed and to set a time-frame within which the problem will be addressed.

Knox often tries to bring people together to resolve problems in a team approach, calling in experts for particular cases as needed. For example, he often consults with experts in environmental law.

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[156] 42 U.S.C. Section 6917 (c); Solid Waste Amendments Pub. L. No. 98-616 Section 2008 (c).

[157] Booz, Allen & Hamilton Inc., *Evaluation of the Hazardous Waste Ombudsman Program*, Environmental Protection Agency, Office of Solid Waste & Emergency Response, Office of Ombudsman, Dec. 1988 ("Ombudsman evaluation").

2. CASE WORK

A. Clients/users

Knox mainly deals with lawyers representing clients who are affected by RCRA regulations. A recent study found that the national ombudsman's main user is the regulated community,[158] followed by the general public, environmental groups, Congress, EPA program offices, and environmental consultants.

In the regions, the regulated community makes the greatest use of the ombudsman service. However, there is a higher percentage of inquiries from the public,[159] environmental groups and consultants than at the national level.

B. Nature of cases

The ombudsman is typically involved in cases in which EPA regulations as interpreted and enforced work an unusual hardship, in matters needing clarification, and in the odd case that does not seem to fit anywhere else. He may also step in in cases of unusual delay.

By far the greatest number of inquiries deal with matters involving RCRA, approximately seven times the amount of any other type of case, including, Superfund, Community Right to Know and underground storage tank matters.[160]

Of the matters handled at the national level, two-thirds of the ombudsman's cases involve requests for information and only one-third involve actual problems.[161]

In most regions, on the other hand, the ombudsmen deal with problems more often than inquiries for information.[162] This may be due to the fact that more problems occur at the regional level, or that clients feel the regional ombudsmen are less remote than the federal office.

C. Acceptance criteria

The RCRA ombudsman responds to complaints and inquiries from the public regarding regulations or technical matters primarily involving the 1976 Solid Waste Disposal Act and the 1984 RCRA program. In addition, the ombudsman may address other matters beyond the RCRA program, including "Superfund" questions. The ombudsman also investigates pesticide and drinking water matters if they involve some hazardous waste issue.

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[158] *Ombudsman evaluation*, p. II-12.

[159] Ibid.

[160] Id, p. II-9.

[161] Id, p. II-8.

[162] Ibid.

If the RCRA hotline cannot answer a question from the public, it is referred to the ombudsman who will ordinarily refer it to the program staff. If that approach fails, the ombudsman may step back in, and handle the problem himself. The RCRA ombudsman may decline to accept a case because it does not fall in the RCRA hazardous waste category (for example, he will refer appropriate cases to the Asbestos or Small Business Ombudsman.)

At the regional level, since most of these ombudsmen deal with problems in the first instance in their roles as program or public information officers, fewer cases are referred to the regional ombudsman as a last resort.

D. Case load

The national ombudsman handles about twice as many cases annually as the busiest regional office, approximately 300 inquiries.[163] It appears that all but one or two of the regional ombudsmen are underutilized. This may be due to the fact that they regard their ombudsman duties as secondary to their principal assignment.

The amount of time devoted to ombudsman activity varies by region depending on which program office houses the ombudsman.[164] Ombudsman located in the Hazardous Waste Management Division spend most of their time on ombudsman duties. Those located in the regional offices of External Programs spend less, those in the Policy & Management Office spend even less time, and those housed in the Waste Management Division spend the least of all.

E. Settlement Rate/Action Taken

The federal RCRA ombudsman responds directly to most cases himself. Only a relatively small percentage of cases are referred to another office to handle itself.[165]

Approximately half of the cases at the regional level are referred to the program offices and the other half are handled directly by the regional ombudsman.

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[163] Id, p. II-4.

[164] Id, p. II-29.

[165] Id, p. II-16.

3. OUTREACH

A. Printed material

Knox produced two manuals, Hazardous Waste Ombudsman Handbook, which is primarily for inhouse use, and a RCRA Orientation Manual, which is also used by the regulated public. The Ombudsman Handbook provides a clear guide to the acceptance, consideration and solution of problems likely to be encountered. The Orientation Manual contains an introduction to the RCRA law and thoughtful, comprehensive sections dealing with solid waste management, hazardous waste management and underground storage tanks. These two volumes provide the necessary background and methodology to permit the regional staff to handle most problems on their own.

B. Meetings with users

Knox gives speeches at technical and professional associations on behalf of the Office of Solid Waste and Emergency Response. He also meets periodically with the regional ombudsmen.

C. Referral mechanisms

Cases are referred to the ombudsman by the various program "hotlines." Program staff and other users also refer matters to the ombudsmen.

4. SPECIAL PROBLEMS

A. Agency Implementation of Legislation

The legislation which created the RCRA ombudsman gave EPA wide discretion in implementing the program. What resulted was an office in which the ombudsman is not independent and not in a strong position to influence the way complaints are handled within the agency. The ombudsman program is still relatively unknown. Most of the regional ombudsmen are ineffective because they downplay the importance of their ombudsman function.

B. Political Environment

The environment in which the EPA Hazardous Waste Ombudsman serves is very politically fragmented. The regulated public includes many diverse interests such as industry, environmental groups, conservationists, local community groups, as well as state and local government. It is more difficult for an ombudsman operating in such a climate to maintain his or her independence and neutrality.

5. ASSESSMENT

A. Within agency

Within the RCRA program area, the ombudsman is underutilized, and does not appear to play a major role in dealing with complaints or grievances.

The RCRA Ombudsman is relatively unknown outside of the program area. It seems to be the prevailing view in the Agency that most problems are handled effectively in normal channels and thus that there is little need for a grievance bureau of the sort contemplated by the 1984 amendment which is the basis for the RCRA ombudsman.[166]

B. At other government agencies

The RCRA Ombudsman is virtually unknown to officials at other agencies.

C. By Users

There is some satisfaction, and in general a positive response, from the clients who have used the service.[167] The ombudsman office seems to be generally perceived as helpful and fair.[168]

D. By Congress

The RCRA ombudsman was initially created as a result of congressional interest. Indeed, but for the follow-up from Capitol Hill there is a question as to whether or not the office would have been set up at all. However, there is little record of effective subsequent congressional oversight of the ombudsman office. Recently, congressional interest in the ombudsman service at EPA has been renewed. As pointed out above, the House version of the bill to establish EPA as a cabinent level agency contains a provision calling for a study of a departmental ombudsman.

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[166] Id, p. II-6.

[167] Based on correspondence received from users. Interview with Robert Knox, EPA RCRA Ombudsman, August 3, 1990.

[168] Telephone interview with Chris Harris, Esq., DC, [date?]

6. SUMMARY & CRITIQUE

The RCRA ombudsman's office possesses the potential to be of significant service to the public. The current ombudsman offers a unique blend of apt skills, technical expertise, and a genuine willingness to be of assistance to persons in need. Because of the organization and location of this office, its lack of support from the top, and its limited resources, the ombudsman's potential has not been realized. Legislation centralizing the various EPA ombudsman functions and elevating the status of the office so that it reports directly to the Administrator (or Secretary) would go a long way towards improving the independence and effectiveness of the ombudsmen offices at EPA.

E. Interstate Commerce Commission Ombudsman

TYPE: Created by Director of the Office of Proceedings.

THUMBNAIL DESCRIPTION: First ombudsman appointed 1975. Staff originally included one ombudsman and one assistant. At its peak in 1980, the ombudsman's office had a staff of five. Four ombudsman served between origin of program and its dissolution in 1985. There has been no official ombudsman at the ICC since then.

CURRENT HOLDER: The ombudsman position was eliminated during the 1985 ICC budget conference.

DUTIES/POWERS: Assisted applicants with motor carrier licenses in filing forms, clarified regulations, and advised applicants seeking licensing approval from the Motor Carrier Board. Later expanded to include other motor carrier issues such as permanent authority filings and interpretations of various provisions of the 1980 Motor Carrier Act.

STATUS IN ORGANIZATION: The position was held by a series of GS 14 adjudicators who were also classified as paralegal specialists. The position was housed in the Office of Proceedings.

1. OMBUDSMAN'S OFFICE

A. Organization/place in agency structure

The ICC regulates interstate "for-hire" transportation by truck, rail, bus and barge. The Commission approves operating licences, maintains evidence and monitors the status of carriers' insurance coverage, reviews rates and hears disputes.

Following Congressional criticism of ICC's "regulatory lag" during the mid 1970's, then Commission Chairman Stafford, established a blue ribbon panel to study the agency's workload. Among other recommendations, the panel recommended that an attempt be made to insulate agency adjudicators and decisionmakers from the public. As a result, the agency created the ombudsman program in 1975 to respond to inquiries from the public about the status of cases and regulations. This office also interpreted ICC rules for the public and assisted in the filing and prosecution of applications for certificates.

The ICC ombudsman was located in the Office of Proceedings, the office handling legal cases within the agency. The ombudsman's office operated as a separate office within the Office of Proceedings to isolate employees of the Motor Carrier Board (the arm within the Office of Proceedings that adjudicated temporary and emergency authority applications) from direct contact with the public. Also, this position was designed to assist the public (usually small motor carriers or the legal counsel of larger firms) with clarification of regulations.

The director of the Office of Proceedings sponsored the ombudsman proposal in 1975 and was instrumental in the creation of the office. When he left, agency support for the program was temporarily diminished. While there also had been a great deal of political support for the ombudsman program by the ICC Commissioners at the time of its creation, new appointees were unfamiliar with the ombudsman program and were less likely to support it.

From 1975 to 1980, the ombudsman office consisted of only the ombudsman and one assistant. As a result of the 1980 Motor Carrier Act (which substantially deregulated and relaxed entry into the interstate motor carrier industry), the role of the ombudsman became more significant due to a much higher volume of inquiries from the public. By this time the office had a staff of five. During the "phasing-in" of deregulation, a large number of new motor carriers wanted operating authority but did not know how to get it. The ombudsman assisted these individuals. Ten telephone "hotlines" were set up at the time to cut through red tape. In 1980, the ICC Small Business Assistance Office and the Small Business Administration (SBA) jointly sponsored nationwide seminars to assist motor carriers in dealing with the new statutory regime.

Between July of 1980 and January of 1985, the ombudsman received enhanced resources. Attorneys and others were detailed to the ombudsman's office to assist with the volume of cases. Those who served as ombudsman were adjudicators, paralegals, or special assistants to the director of the Office of Proceedings. At times during this period, the ombudsman also served as spokesperson for the Office of Proceedings.

The services provided by the ombudsman office were needed during the phasing in of motor carrier deregulation. Following the relaxation of entry requirements, thousands of applications were filed by persons seeking initial or expanded operating authority. Not surprisingly, a considerable number of applicants or their legal representatives were unfamiliar with the new rules.

As the industry became acquainted with provisions of the 1980 Act and the ICC's new procedures, the volume of inquiries lessened. The Commission's budget was then reduced and the agency was forced to eliminate several positions.[169] Auditors were brought in to help consider ways to reduce the size of the agency. The ombudsman's position was eliminated in 1985 and many of its functions were assigned to other offices within the agency, including the Small Business Assistance Office[170] and the five motor carrier teams of the office of proceedings.[171]

The Small Business Assistance Office and the Special Counsel's Office[172] were merged in 1984 to create the current Office of Public Assistance.[173] Some feel that the attorneys in this office who now respond to inquiries are not as responsive as the previous ombudsman's office.[174] Even though the position was officially eliminated, two former ombudsmen are still with the ICC, and occasionally serve informally as such because of the relationships they had built with parties they previously served in their official capasity.

B. Authority/Scope of Duties/Limits on Power

This ombudsman was charged with responding to inquiries from the public regarding the motor carrier regulations, licensing applications, and related issues. New interstate transportation laws were interpreted for the public. The ombudsman's office also provided advice to regional motor carrier boards and other review boards concerning policy, procedures and decisionmaking criteria in temporary authority proceedings.

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[169] The 1981 Staggers Rail Act and the 1982 Bus Regulation Reform Act were instrumental in both the deregulation of the interstate transportation industry and the ultimate shrinkage of the ICC. During the early 1980's, ICC field offices went from over 50 to just 22 in number. Originally, there were six ICC regional offices, now there are just three. The Office of Proceedings staff also fell from 360 to 110.

[170] A satelltite office of the Chairman created in 1977.

[171] Additionally because of staffing cuts throughout the ICC, the five motor carrier teams were reduced to four.

[172] An office within the ICC charged with contributing to the development of complete records in agency proceedings and with authority to participate in cases before the commission.

[173] The mission of the Office of Public Assistance is to advise small businesses, shippers, governmental bodies, and the public of Commission policies, rules, programs, and proceedings affecting their interests; and to contribute to the development of complete records in agency proceedings and advise the Commission of changing public needs and concerns relating to the regulated interstate surface transportation industry.

[174] Interview with Judy Holyfield, ICC, Thursday, October 5, 1989.

The ICC ombudsman did not have the authority to issue corrections, process applications or pleadings, nor to direct other agency offices to make corrections; it had no power or authority to change a board or ICC decision. The office helped the regulated applicants perfect their applications. The ombudsman also interpreted decisions for applicants, explaining to applicants the reasoning for board findings and decisions.

Unlike the Small Business Assistance Office, which acted as a clearinghouse for the resolution of problems experienced by small and minority businesses and users of interstate transportation, the ombudsman's office extended its services to include furnishing help to businesses represented by legal counsel and larger organizations. Although the ombudsman was expected to develop recommendations concerning existing or proposed ICC policy, rules, or regulations,[175], such advice was not normally offered unless specifically requested. On the other hand, one of the Small Business Assistance Office's primary objectives was to advise the Commission of the changing problems and concerns of both transportation providers and consumers and to recommend actions to address such issues, and they often consulted with the ombudsman soliciting their suggestions on matters pertaining to motor carrier licensing.

C. Modus Operandi

Work handled by the ombudsman's office normally began with a request for assistance to interpret ICC rules and policies as well as problems with pending cases. If problems existed that office would indicate a number of "trouble shooting" actions, such as contacting the appropriate motor carrier team supervisor to resolve the problem. The ombudsman office's intake process started by checking the status of the applications. Then a judgment was made as to whether or not the case required special handling.

Ombudsman office clerks performed the intake function and provided status reports to the applicant. The ombudsman's office had a policy that all calls should be handled within 24 hours. The ombudsman kept records of their cases on log sheets. Daily records were kept for each inquiry handled which identified the person seeking assistance, the nature of the inquiry, the response provided, and any recommendations to other offices.

The ICC ombudsman supervised a staff in providing assistance to the general public about ICC law and regulations and application processing requirements. The ombudsman also analyzed problems and suggested corrective alternative solutions. The assistant ombudsman also developed manuals for staff use and the training of new employees.

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[175] Based on description of duties from a performance evaluation.

Although the ombudsman program was not designed to provide a complaint handling function, ICC has other mechanisms which are responsive to the public. Currently, the Section on Tariffs occasionally receives complaints from the public. If it is a complaint about a legal case, the case is referred to the Office of Proceedings. Any other ICC complaint will result in a letter going to the director of the affected office. Most complaints are handled at the regional level, due to the fact that staff in the field often have first hand knowledge of problems.

Most ICC dealings with the public involve inquiries rather than complaints about the quality of service. Currently, status calls are responded to by the Status Branch of the Office of Proceedings. Inquirers must have knowledge of the docket numbers before requesting the status. Questions beyond the status of motor carrier application filings are handled primarily by the Office of Public Assistance.[176] In addition to answering questions and offering suggestions to persons seeking motor carrier authority information, upon request the Office of Public Assistance reviews draft application filings and offers recommendations to insure completion of requests and that they are legally sufficient.

2. CASE WORK

A. Clients/users

The major constituents of the ombudsman's office were lawyers, practitioners, and carrier officials, representing primarily motor carriers as well as brokers, freight forwarders and water carriers. Most of the ombudsman's time was given to new applicants in the field as well as smaller entities not represented by attorneys.

B. Nature of cases

The ombudsman's primary area of responsibility involved applications for motor carrier licensing. The ombudsman office handled inquiries about ICC rules, procedures, and policies. Inquiries dealt with everything from whether a particular rule was still in effect to obtaining relief for a particular problem.

The ombudsman was also called upon to interpret agency and board decisions for the public. The ombudsman also assisted with filing of applications and with administrative compliance requirements for the issuance of certificates and permits. The ICC ombudsman provided status reports on pending authority applications based on computerized data printouts.

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[176] The current Office of Public Assistance tries to anticipate the needs of the public. This office does not lobby nor advocate for legislative change. It does, however, give its opinion on proposed ICC policy and legislation. Mainly, the Office of Public Assistance gives information and provides referrals for the public.

C. Acceptance criteria

No formal set of criteria existed for the ombudsman to become involved with a particular case. While the ombudsman's office often discovered problems with an application for a motor carrier licence and intervened on the applicant's behalf, usually former clients referred cases to the ombudsman. Occasionally, other agency staff would also refer cases to the ombudsman's office.

D. Case load

During Fiscal Year 1981, the ICC Ombudsman office responded to approximately 73,000 public inquiries.[177] More than half of those inquiries involved the status of pending applications, about a third dealt with regulations, and one tenth involved individual cases with procedural problems.

E. Settlement Standards

The ICC ombudsman was judged primarily on responsiveness rather than the rate of settlement of cases.[178] The performance measurements required that minimum standards and time frames be met before a fully satisfactory performance rating could be given to the ombudsan. The performance standards required that the ombudsman staff answer inquiries at or about the time of receipt 90% of the time. The ombudsman also was to return call-back messages on the day they were received 90% of the time. Ombudsman staff were required to meet informational needs within an acceptable time frame 80% of the time and generally did so. Adverse feedback about the ombudsman was limited to less than 1% of inquiries handled. The ombudsman was expected to completed review of draft applications within 48 hours after receipt at least 90% of the time. Responses to inquiries via correspondence were to be completed within 48 hours 90% of the time. The performance appraisals of all ombudsman consistently exceeded the fully satisfactory standards.

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[177] Holyfield, *What the ICC is Doing for its Constituents*, E. TRANS. LAW SEMINAR, 1981 p. 161.

[178] Found on an ICC performance appraisal of the ombudsman.

3. OUTREACH

A. Printed material

The ombudsman sent out press releases and developed a small business motor carrier assistance booklet.

B. Meetings with users

The ombudsman would give speeches to professional associations and the regulated transportation community.

C. Referral mechanisms

Cases were often referred from staff from other offices within ICC, such as the Congressional Liaison and the Small Business Offices and hotlines as well as from former clients.

4. SPECIAL PROBLEMS

The ICC ombudsman's office was severely limited in its authority. It was housed in a line office at a relatively low level in the organization, and dealt only with one type of problem, motor carrier applications. It did not have the prestige within the agency that an ombudsman with a broader mandate and higher status might have had. Questions of neutrality and independence were not issues for this ombudsman, given that it was not his or her place to challenge board or Commission actions. The ombudsman's effect on agency policy, procedures and regulations was quite limited.

5. ASSESSMENT

A. Within agency

The ICC ombudsman was well liked by the commissioners during its heyday. It was perceived as fulfilling its limited mission at the time when it was needed. Because of the crisis in the deregulation of the motor carrier field, other offices, such as congressional affairs and public assistance, welcomed the assistance of the ombudsman at the time. Its limited success gave rise to some internal agency rivalries, because some staff members in the agency apparently resented the influence of the ombudsman with agency higher ups.[179]

B. By other government agencies

The Department of Transportation had a favorable opinion of the ombudsman program at the time.[180] It was perceived as serving a helpful function during a turbulent period.

The Small Business Administration had a good working relationship with the ICC ombudsman office.[181] This was because of their shared interest in assisting smaller interstate transportation entities with federal regulations affecting them. SBA and the ICC often sponsored joint workshops for small motor carriers.

C. By Users

In general, the ICC ombudsman was thought to be knowledgeable and responsive by those who used the service.[182] The responses from those users who were appropriate recipients of ombudsman aid were quite favorable. While the client population was limited by the scope of the ICC's ombudsman operation, few bureaucrats in the agency were thought of as being more helpful to the public than these ombudsmen.[183]

D. By Congress

The ICC ombudsman was well liked by congressional staff involved in transportation deregulation. Congress realized the traumatic effect deregulation would have upon the interstate transportation industry, and welcomed innovations to ease the transition. Congressional staffs also could better help constituents by using the ombudsman service. However, once the agency adjusted to the new legislation, the Congress could no longer justify continued support for the ICC ombudsman as it was originally designed.

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[179] Interview with John Hedetniemi, ICC, Thursday, October 5, 1989.

[180] Ibid.

[181] Interview with Judy Holyfield, ICC, Thursday, October 5, 1989.

[182] Based on correspondence from users which was received by the ICC ombudsman during their tenure. (Interview with John Hedetniemi & Judy Holyfield, ICC, Thursday, October 5, 1989.)

[183] Interview with Gary Edles, former Director of the ICC, Office of Proceedings (currently Legal Counsel, ACUS), Friday, October 6, 1989.

6. SUMMARY & CRITIQUE

This ICC ombudsman program was very limited in its mission. It only operated in one functional area and therefore did not serve the entire agency nor did it serve all the public which the Commission regulated.

Because the ombudsman's office was set up to serve a short-term need (i.e., better agency responsiveness to motor carrier license applicants), its position was tenuous once this need diminished. The main justification for continued existence of the ombudsman function was that it was a means for the agency to respond better to the deregulation crisis, but once this ended, the office was disbanded. Now any remnants of any "public responsiveness" function the ombudsman provided have been transferred to other offices within the agency.

This is one ombudsman model that agencies can look to for improving bureaucrats' responsiveness to the needs of the regulated public in a crisis--that is, a short term mechanism to provide basic data to the public and "limit the damage" which otherwise might be caused.

F. The Department of Commerce Ombudsman

TYPE: Executive; Created by order of the Secretary of Commerce in 1971.

THUMBNAIL DESCRIPTION: First federal ombudsman. Responded to complaints and inquiries from companies having trouble doing business with the government. Acted as a go-between for businesses with other federal agencies. Between 1971 and 1973 the office consisted of the ombudsman, two professionals and two secretaries with other professionals assigned on a temporary basis as needed. Initially successful; mission diluted and ultimately eliminated as the result of successive reorganizations.

CURRENT HOLDER: None. Office defunct. Remaining functions located in the Office of Business Liaison, Diane Terpeluk, Director.

DUTIES/POWERS: Typical cases included mishandling of export license applications, payment disputes; complaints about red tape and penalties for failing to respond to requests for business information.

STATUS IN ORGANIZATION: Originally located in Secretary's office where it was independent, authoritative. Subsequently moved to the Office of Domestic and International Business Administration where its status and authority were gradually reduced; subsequent organizational changes converted office to a business information office.

1. THE OMBUDSMAN FOR BUSINESS

Maurice H. Stans, Secretary of Commerce in the first Nixon administration, established what appears to have been the first ombudsman in the federal government. He created the Ombudsman for Business by secretarial order in March 1971.[184] The primary purpose of the office was to reduce the red tape in doing business with the government.

Secretary Stans was ahead of his time. Interest in using an ombudsman in the federal government was high in the 1960's and early 1970's. Up to the time of the Stans order, however, no one had turned the talk to deed. The order setting up the office contains three sections, each brief and to the point. When the order showed up on the department's bulletin boards, it must have been clear to all that the secretary meant to lend a hand to those who hit a snag in their efforts to do business with Uncle Sam.

A. Organization/Place in Agency Structure

The order established the position of Ombudsman for Business in the secretary's office. The ombudsman was given the status of a special assistant to the secretary and reported directly to the secretary's office. Initially, the ombudsman's office had a complement of five persons: the ombudsman, Thomas Drumm; two professionals, Gordon W. Schmidt and Martha C. Finerty; and two secretaries. In addition, the ombudsman was authorized "as necessary" to call upon units of the Department "for services of personnel and other assistance in carrying out his functions."[185]

This initial organization lasted until Mr. Drumm, the first ombudsman, retired in June 1973, and, from the account of those who assisted him, worked well. In fact, the first two years seem to have been the most productive for this program.[186] Since then it has been recast, moved, amalgamated, and more or less forgotten. Several months passed before a successor to Drumm was appointed. In the meantime, as the result of effective internal lobbying by the office of Domestic and International Business Administration (DIBA), the ombudsman office was moved to DIBA where the ombudsman and his staff reported to the assistant secretary. This move, which appears to have been a means to capture the budget associated with the ombudsman function, weakened the authority of the ombudsman and was the first of several steps which have diluted its problem solving role to the vanishing point.[187] Today, following a reorganization in 1980, what remains of the original functions are performed in the Office of Business Liaison, where Schmidt and Finerty report to the Director. The title "ombudsman" is no longer in use.

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[184] Department of Commerce Organization Order 15-7, issued March 26, 1971 (USCOMM-DC - 7171).

[185] In practice, that gave the ombudsman temporary borrowing rights to staff members from other offices in the department. The borrowed professionals were called on when the ombudsman's office was unusually busy or otherwise short handed. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990.

[186] Interview with Diane Terpeluk, Director of the Office of Business Liaison, Gordon W. Schmidt and Martha C. Finerty, members of the business assistance staff of OBL, August 1, 1989.

B. Authority/Scope of Duties/Limits on Power

The Ombudsman for Business derived authority from the secretarial order creating the office. The order empowered the Ombudsman for Business to carry on the following functions:

> 1. Field questions on federal government programs of interest to business.
>
> 2. Serve as a focal point for the lodging of complaints, criticisms and suggestions from the public about Government activities relating to business.
>
> 3. Arrange conferences for businesses with officials within the Department and in other government agencies and to follow up to determine whether further assistance was necessary and appropriate.
>
> 4. Develop proposals to remedy the causes of complaints for the action of the Secretary.[188]

As this shows, the Ombudsman for Business' authority to mediate a complaint to a solution was more implicit than explicit. At least in the first phase of its existence, however, the Office did just that.[189] The Ombudsman for Business' authority was carefully limited to preclude the office from intervening to "assist businesses and individuals on specific matters, cases or issues before Federal regulatory agencies . . ."[190] In addition, the order specified that the Ombudsman not "participate in, intervene in regard to, or in any way influence, the negotiation or renegotiation of the terms of contracts between business and the Government."[191]

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[187] Drumm's successor tried, and failed, to have the ombudsman's office moved back to the Secretary's office. As an agency newcomer, and one who arrived on the scene after the critical decision to relocate the ombudsman had been made and put into effect, he was unable to persuade then Secretary Frederick B. Dent to reverse the action. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990.

[188] Ibid.

[189] Interview with Schmidt and Finerty, August 1, 1989. For example, the ombudsman helped to work out payment by a foreign concern for agricultural goods purchased from an American supplier who had not received payment prior to the ombudsman's efforts. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990. More frequently, the ombudsman served as a go-between for businesses in their dealings with other federal agencies.

C. Modus Operandi

In its first phase, the ombudsman was a trouble shooter for the Department and to a lesser extent for other government departments and agencies. When it received a complaint within its broad jurisdiction, it undertook to investigate, find the facts, talk with the Department or other government official involved, and propose a solution. For example, one function of the Department was to encourage the export of American goods. Delays in processing requests for export licenses formed a bottleneck which could deprive American businesses of foreign trade. If the ombudsman's approach to the licensing office did not suffice to get action on the license, the ombudsman could appeal directly to the secretary for help in bringing about action on the export license. In the early 70's, particularly 1973-74, a number of commodity shortages existed. Many businesses and individuals wrote to complain and to seek help in finding supplies of various chemicals, home canning lids and jars, steel, bailing wire, and other products. The Ombudsman staff responded to letters and phone calls on short supply matters by preparing and mailing Situation Reports.

Files were established for each matter as it was received and one of the professionals in the office assigned. The ombudsman established standards for prompt processing of complaints and procedures for follow through to make sure that the matter was dealt with and that the person raising it had a ready means to check on its status.

Today, by contrast, the OBL serves as an information office, directing businesses to the office where their matter or application awaits action and making sure that they are offered a chance to be heard. As Diane Terpeluk, the Director of the Office of Business Liaison in the Commerce Department put it, "I feel everyone should have a chance to present their case."[192]

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[190] Secretarial Order, op. cit. *supra.*, Section 3.02.

[191] Id at Section 3.03.

[192] Schmidt & Finerty interview, August 1, 1989.

2. CASE WORK

A. Clients/Users

The Office accepted inquiries and complaints from businesses and others with dealings with the government. It also fielded inquiries from the press.

B. Nature of the Cases

Delays encountered in applications for export licenses accounted for a large part of the early case load, as did late payment complaints. The office also dealt with complaints about discourteous (or even abusive) conduct and complaints about slow or inadequate responses to correspondence. The office dealt with complaints that businesses had been unfairly disqualified from doing business with the government, and with complaints about the imposition of penalties for failure to complete and return forms requesting certain business information.

C. Acceptance Criteria

The Office accepted virtually all the requests it received for assistance that were bona fide on their face and which did not run afoul of the limits on the Office's authority set out in Sections 3.02 and .03 of the Order creating the Office.[193]

D. Case Load

There are not statistics available on the number of cases handled by the original ombudsman and his staff. However, the early ombudsman actively encouraged the use of the office and sought to respond quickly to complaints. Today, OBL serves primarily an information dispensing function, responding to requests from the public and the press. It handled 18,000 queries in 1985, most asking about government procurement, exporting, marketing, statistical sources and regulatory matters.

E. Settlement Rate

The Office successfully expedited the grant of export licenses in the early '70's, and ultimately helped work out a solution to the processing log jam, by recommending a numberof remedies to the Secretary including an increase in the procesing staff. The Ombudsman was also able to deal effectively with complaints about slow payment of bills, a problem ultimately resolved by the passage of the federal Prompt Payment Act. Since the OBL no longer serves complaint handling functions, it is not meaningful to use case settlement data as a measure of its effectiveness.

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[193] See footnote 192, *supra*.

3. OUTREACH

A. Printed materials/Hotlines

Initially, the ombudsman used a printed brochure and a press release to describe the service and to encourage its use. The office was also described in Commerce Department publications (e.g.,"Business America" and "Commerce Business Daily"). The Ombudsman for Business was also publicized in trade association and other private sector publications.

Today, OBL uses a brochure to describe its information service. There is no toll free hotline, but preprinted Rolodex cards with the OBL telephone number are sent with the brochure and other printed materials.

B. Meetings with Users

The initial ombudsman met frequently with businessmen, spoke at trade meetings and conventions, where he touted the service provided by his office and handed out the brochure describing it.

C. Referral Mechanisms

The Commerce Department staff was extensively briefed on the service and encouraged to refer persons to it. In addition, the ombudsman was instrumental in having liaison officers appointed in the other cabinet level departments and other agencies such as the General Services Agency, Environmental Protection Agency and the Small Business Administration, to work with the ombudsman and to refer matters to his office.

4. SPECIAL PROBLEMS

The most arresting feature of the ombudsman for business is the ease with which it was originally created by Secretary Stans. With a stroke of the pen, the office came into being in March 1971. For the next 26 months it operated actively as an ombudsman, taking complaints, sorting them out, mediating between businessmen and bureaucrats, and coming up with proposals to deal with chronic problems such as the delays in acting on export license applications. The two professionals who served as the ombudsman's principal assistants reflect the satisfaction the office took in its accomplishments. But once Drum retired and the office was downgraded, its mission was modified, and it lost its unique problem solving role. Thus the ease with which the office was created seems to have foreshadowed the ease with which it was undone. This experience suggests that an executive ombudsman needs a constant champion in the head of the department or agency in order to remain viable. It also suggests that a permanent ombudsman, one required by statute, will be less effective during periods when the office is not actively supported by the agency head.

5. ASSESSMENT

Such data are difficult to locate for this program. Gordon Schmidt and Martha Finerty consider their work in the original Ombudsman for Business Office as a high point in their careers in the department. Their feelings are based on their sense of accomplishment and the value of the mission.

6. CRITIQUE

In many ways, this is the most interesting of the case studies conducted for this report. It was apparently the first ombudsman's office established in the federal government following the spate of interest in the idea that occurred in the 1960's. From what we now know, it worked well. After the first ombudsman retired, the office became a budget plum for the Office of Domestic and International Business. The ombudsman was not successfully repotted and gradually wilted to its present status as a query answering function in the Office of Business Liaison. All that remained of the first operation when the current OBL Director took office was a minute or two in her briefing about the remaining ombudsman functions and how they came to be placed in her office.[194]

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[194] Interview, August 1, 1989. See fn. 187, *supra*.

IV. ISSUES TO BE CONSIDERED IN ESTABLISHING AN OMBUDSMAN

A. Legislative versus Executive Ombudsmen: What turns on the choice?

The more independent an ombudsman is, the more effective. This is the prevailing view of the students of the field, and it is amply born out by our investigations. It also seems to be the case that ombudsmen created by an act of the legislature (we know of no instance in which a state constitution calls for the appointment of an ombudsman) are more independent, more durable and at least as effective as ombudsmen created by agency order. On the other hand, there are situations where expediency may require that an ombudsman be created without waiting for the legislature to act.

The early state ombudsmen (Iowa, Nebraska, Alaska and Hawaii) were created by acts of their respective legislatures. By law, the ombudsman in each of those states is separate from the executive branch agencies with which it deals. While the law creating the ombudsman in each of those states may be may be modified or even repealed,[195] until it is the ombudsman enjoys a status sufficient to command the attention and respect of the other state agencies.

By contrast, most of the federal ombudsmen derive their authority from an order of the agency which they were created to assist: of those we studied, the Commerce, Interstate Commerce Commission, Army Material Command and the Internal Revenue Service ombudsmen were set up by departmental order; the RCRA ombudsman was set up by departmental order implementing a provision of the 1984 RCRA amendments passed by Congress. The fate of the Commerce Department ombudsman illustrates one drawback of creating an ombudsman by administrative fiat. While the order permitted then Secretary Stans to establish the office quickly, his successors were free to reassign and downgrade the ombudsman's office to the point where the function is little more than a memory today.

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[195] More likely, a disgruntled legislature (or one finding itself financially strapped) may cut the ombudsman's budget. For example, the Alaska state ombudsman's budget was cut in half one year (and only gradually restored) after the office incurred the displeasure of a Senator who attempted to obtain confidential information from the ombudsman to use in an election. In Iowa, the ombudsman's office survived by a tie vote in the Senate when a hostile Senator proposed to eliminate the office as a cost cutting measure.

In theory, at least, the IRS Taxpayer Ombudsman, which was administratively created could have been administratively eliminated until Congress passed the Omnibus Taxpayer Bill of Rights legislation in 1988. By giving the ombudsman certain powers (e.g., the ability to issue Taxpayer Assistance Orders) and duties, Congress put its imprimatur on the office. While the U.S. Code does not state in so many words that there shall be an ombudsman in the IRS, that would seem to be the purport of the 1988 law. However, this form of organization does not insulate the IRS ombudsman from the need to wage internal battles for budget, prestige and influence. As it stands, then, the Taxpayer Ombudsman may be classified as a mixed legislative/executive ombudsman, reflecting an accommodation that is not unusual in our system of government, particularly in a period when Congress and the White House are controlled by different parties. And while this accommodation results in a structure that is vulnerable to change as agency notions of good administration change, it has been a durable model so far.

One has only to look to the RCRA ombudsman, however, for an example of a mixed legislative/executive ombudsman that has not been as effective. In the RCRA case, the legislation came first in the form of a two-paragraph provision in the 1984 RCRA amendments. The law called for the establishment of an ombudsman to help the public deal with the increasingly complex requirements for disposing of toxic materials and other hazardous wastes. Apart from a four-year sunset provision and a few other particulars, however, Congress left it to the agency to flesh out the proposal and implement it. The agency apparently was opposed to the idea from the beginning and showed little interest in creating the office or assuring that it would be effective. It not only delayed creating the office for two years (and then did so only in response to congressional prodding), when it finally acted, it placed the office inside the program, where it is neither a full-fledged ombudsman nor a conventional public information office. It has evolved as more of an interpreter of program decisions than an independent representative of the public.[196]

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[196] The struggle between Congress and EPA over the need for and role of an ombudsman is ongoing. Early drafts of House bills to make EPA a cabinet level department contained language (similar to that in the pending bills to make the Social Security Administration an independent agency) called for a single, department-wide ombudsman at the secretarial level. The provision was deleted from the bills as introduced to obtain bipartisan support. At the House Government Operations Committee hearing on the House bills on February 7, 1990, EPA Director William K. Reilly, in answer to a question, objected to adding the ombudsman provision to the bill. He said the agency did not need another ombudsman or another pair of eyes looking over EPA bureaucrats' shoulders. The bill's ranking Republican sponsor, Rep. Frank Horton (N.Y), said the administration also opposed the ombudsman for budgetary reasons and he expressed the view that the President would veto the bill if it contained provision for an ombudsman. In the

Legislation to make the Social Security Administration an independent agency is also under consideration by Congress. It contains a provision for a Beneficiary Ombudsman with powers not only to handle individual complaints, but also to serve as an advocate for beneficiaries in agency policy formation. If adopted, this provision would lead to the first legislatively created permanent ombudsman in the federal government. While it may be necessary to revisit the law after some experience with the resulting ombudsman's office, such a legislatively created ombudsman would seem to overcome many of the weaknesses observed in the executive and mixed legislative/executive models examined for this study.

B. Method of Appointment

The pending legislation to establish the Social Security Administration as an independent agency places responsibility for administering the agency in the hands of a board appointed by the President with the advice and consent of the Senate. In turn, the board is given the power to appoint the beneficiary ombudsman provided in the bill.[197] The model ombudsman statute places the power to appoint in the executive subject to confirmation by the legislature.[198] The executive ombudsmen considered in this report were selected by the head of the agency without formal consultation with the legislature. Given the nature of the ombudsman function, the method used to select the ombudsman should, to the extent possible, assure the ombudsman's independence and neutrality.

C. Qualifications of the Ombudsman

The ombudsman should be one who is by experience, training and temperament able to command respect for his or her proposed solutions to

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meantime, EPA has not said whether it will seek authority to continue the RCRA ombudsman beyond its currently scheduled 1990 expiration under the four-year sunset provision. Given the Agency's opposition to the ombudsman provision in the cabinet status bill, it is entirely possible that it will close the RCRA office if it can do so without offending congressional proponents.

[197] H.R. 791, 101st Cong., 1st Sess. See sections 101 and 102.

[198] Gellhorn, Walter, "Annotated Model Ombudsman Statute," in Anderson, Stanley V. (editor), *Ombudsmen For American Government*, Prentice Hall, Englewood Cliffs, N.J., 1968, pp. 159 & 161.

problems, and one whose views will be sought by agency policy makers. Professor Gellhorn found that "experience abroad points clearly to the desirability of the ombudsman's having a legal background because he must deal with many grievances that hinge on analysis of statutes and rulings."[199] He also recommended against requiring any specific experience and against absolutely excluding any category of persons (such as former legislators or other office holders) from the position.[200]

D. Who Needs an Ombudsman?

Larry B. Hill, the University of Oklahoma expert on the nature and use of ombudsmen in this country, states, "[w]hatever else an ombudsman may be, it is an additional citizen access point to the 'system'."[201] Hill classifies government agencies along functional lines as follows: client-serving agencies (e.g., those dealing with housing and employment problems); client-processing agencies (licensing, regulation, taxation) and "nonclient oriented" agencies (resources and manufacturing problems, environmental and land problems).[202] In terms of the need for improved citizen access to these agencies, there is nothing about their respective functions that makes one or the other of the three categories more or less likely to benefit from having an ombudsman. Inevitably, problems will arise in all three, problems that, in the last resort, will be thrashed out in litigation, rulemaking or legislation if the agency's processes are inadequate to the task.

There are, however, some agency profiles which call out for the establishment of an ombudsman to deal with a particular exigency. The IRS Problem Resolution Program was set up to meet congressional concern that taxpayers were being inadequately served by the nation's tax collector. The backlog in processing tax refunds in 1985 added to the concern and led to a somewhat beefed up operation. This might be called the BUBD profile--backed up and bogged down. In 1980, the Interstate Commerce Commission enlarged its ombudsman's office to help it deal with the surge of applications it received after Congress deregulated interstate common carriage by truck, bus and barge lines. This might be classified as the temporarily overwhelmed agency profile, or, perhaps, the agency in transition profile. Similarly, the Federal Emergency Management Agency offices that handled disaster aid in the wake of the 1989 hurricane in the Carolinas and the San Francisco earthquake might have used ombudsmen on a temporary basis to help deal with the problems caused by those two disasters.

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[199] Id. at Section 5, p. 162.

[200] Ibid.

[201] Hill, Larry B., *The Citizen Participation-Representation Roles of American Ombudsmen*, 13 ADMINISTRATION & SOCIETY 4, 405, 407 (Feb. 1982).

[202] The latter might just as aptly be described as a mixed client serving and client processing agency.

An ombudsman may also be used to good advantage in the troubled agency setting, both to help sort out the problems confronting the agency and to help restore public confidence. Housing and Urban Development Secretary Jack Kemp made use of the Department Inspector General to help identify and eliminate fraud and abuse in coping with the maladminstration of several of the Department's grant-in-aid programs. An ombudsman could have provided an early warning, and would have helped the Department deal with the problems raised by members of the public and businesses who suffered as a result of program abuses. To a similar end, an ombudsman in the Office of Federal Savings and Loan Insurance in the Federal Deposit Insurance Corporation attempts to deal with the problems that have arisen recently in the savings and loan area.

When an ombudsman is established to respond to a particular emergency or unique array of circumstances the office may, as was the case at the ICC, be disbanded once the crisis is past. The better course is to put it on permanent footing, either to help prevent the reoccurrence of the situation that led to its creation or to be ready to deal with the next emergency. Once the cadre of trained problem solvers is there, it seems wasteful both of funds and public respect to unseat them.

Quite apart from the occasions which call for the creation of an ombudsman to help an agency cope with a crisis of confidence, there is as much or more to be gained by establishing an ombudsman to help keep a well-functioning agency on course. One authority has observed that the agency that benefits most from having an ombudsman is a well run agency because of what the ombudsman is able to do to keep it that way.[203] In an era when it seems more difficult and time consuming than ever to obtain even routine services and information from the government, a phenomenon one authority describes as the "bureaucracy problem," the potential assistance an ombudsman may provide is too great to forgo.[204]

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[203] [Professor Gellhorn?].

[204] The term "bureaucracy problem" was coined by James Q. Wilson in 1967. We are indebted to Larry B. Hill for the reference. See footnote 202, *supra*.

E. Where Does the Ombudsman Belong?

By definition, the ombudsman is not a line official. The job of the ombudsman is not to administer the program, collect the tax or issue the permit. If anything is clear, then, the ombudsman should not be located in a line office and should not report to a line official.[205] Having said that, it should be noted that the location of the office may hinge as much on who sets up the ombudsman, the legislature or the executive, as on any organizational principle. The states that have created ombudsmen by statute provide that the office is independent of the executive and provide that it report to the legislature. This assures that the ombudsman is independent and that its recommendations will receive the attention of the executive branch officials whose action is the subject of the ombudsman's interest. An ombudsman that stands outside the agency gives up the insider's advantages: informal access to the head of the agency, and the trust and respect that comes from working relationships formed during his or her agency career.[206]

Executive ombudsman, on the other hand, are usually placed in or near the office of the agency director or head of the office for which the ombudsman is appointed. This is the case with the IRS and AMC ombudsmen, and of the Commerce Department and ICC ombudsmen during the periods of their greatest effectiveness. The subsequent histories of the Commerce and ICC ombudsmen demonstrate the adverse effects of moving the ombudsman out of the director's office into a line function.

Three objectives are served by placing the ombudsman in or as an adjunct to the director's office. First, it is the organizational arrangement most likely to assure the independence of the ombudsman from undue pressure from the line functions. Second, it provides the ombudsman with the perspective from which to observe all the agency's operations and to suggest reforms to enable the agency to better perform its mission. Third, it allows direct access to the director thereby assuring that the ombudsman's views on individual complaints and policy matters are not watered down during review by the line operation involved. In short, placing the ombudsman in the director's office is the most effective means available to provide the public meaningful access to the head of the agency when the public senses it has a "bureaucracy problem."[207]

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[205] The lack of effectiveness of the RCRA ombudsman is attributable to the agency's decision to place the ombudsman in the line office and make him responsible to the assistant administrator (actually the deputy assistant) for the line function. As such, the ombudsman shares responsibility for carrying out the line program, and is deprived of the independence required of a neutral in a dispute resolution context. Moreover, since the office is regarded as something of an unnecessary evil in the agency, the ombudsman is almost entirely dependent on his personality and persuasiveness to obtain results.

[206] These are not insubstantial advantages. Personnel ombudsmen, i.e., those who deal with employee relations matters, are often chosen from among the agency's most senior and respected executives as the career servant's last assignment before retirement. An end of career appointment helps assure the personnel ombudsman's independence and neutrality since he or she will have nothing of a professional nature to gain by seeking to curry favor with either party to a dispute. The World Bank is one of the entities that follows this practice to good effect.

F. The Ombudsman's Functions and Powers

Professor Hill uses six models to describe the ombudsman's orientation to the public: the impartial investigator, the enabler-facilitator, the broker-negotiator, the arbitrator, the advocate and the political activist.[208] He found very few ombudsmen who identified arbitration and none who identified advocacy or activism as either the primary or secondary function of their offices.[209] This study confirms that the investigation and resolution of complaints are the primary function ombudsmen perform for individual members of the public. And while advocacy of institutional changes to improve agency operations is a common function, it is carried on for the benefit of the public at large rather than at the behest of an individual citizen.

The ombudsman's authority, that is, the ability to command respect and attention for the solution proposed to deal with a particular grievance or class of grievances, turns to a large degree on the power the ombudsman has to conduct meaningful investigations and to report findings and make recommendations. The power to investigate on complaint, or on his own motion, any act of the department or agency, the ability to examine agency records and interview agency personnel, and to issue subpoenas to compel the attendance of witnesses and the production of documents deemed relevant to the subject of the investigation are among those commonly provided to legislative ombudsmen.[210] The executive ombudsmen covered in this study typically have less authority to compel the production of testimony or documents, but generally had authority to investigate complaints and, in some cases, to conduct investigations. For example, the AMC ombudsman's charter charges the ombudsman with the duty to "[c]onduct impartial reviews or evaluations of the effectiveness of AMC programs."[211]

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[207] The organization charts showing the location of the ombudsmen studied in this report are reproduced in Appendix D.

[208] Hill, Larry B., *infra*, fn. 199, p. 422.

[209] Id. at 423.

[210] *Annotated Model Ombudsman Statute*, *op. cit supra*, fn. 199, p. 164-165, Section 9.

[211] AMC Ombudsman Charter, *op.cit supra*, fn.81, Section IV. B. 1. g.

Within the limits set out in the legislation or order creating the ombudsman, the ombudsman should have discretion to accept or reject a particular complaint or type of complaint and to prescribe the form in which a complaint is made. There is a closely related issue going to the question of whether the ombudsmen should encourage use of the service or reserve it for difficult or intractable cases. While it is essential that the ombudsman not be seen as supplanting existing grievance handling mechanisms or replacing other normal processing procedures, it is equally important that the service not be underutilized or available, as a practical matter, only to lawyers and others who regularly deal with the agency.[212]

G. The Question of Confidentiality

1. When is it needed?

Should the complaint proceedings conducted by an ombudsman be subject to a privilege protecting the information provided from disclosure and the complainant from the possibility of retribution or embarrassment? The answer to that question would seem to vary according to the circumstances.

Some matters, like those involving whistle blower, are particularly sensitive. Unless a whistle blower may approach the ombudsman with his concerns without fear of jeopardy, it is likely that the employee will look elsewhere to unfold his or her suspicions (e.g., by a surreptitious call to the press) or simply hold back.[213]

By law, tax returns and data relating to entitlement to Social Security and veterans benefits are treated as confidential information. In these matters, the taxpayer or benefits recipient ordinarily authorizes the agency to deal with his or her representative. By the same token, the taxpayer ombudsman and the Problem Resolution Program staff are entitled to inquire into the matter when a request for assistance is received. But the ombudsman is not thereby entitled to disclose the matters in dispute to a third party, e.g., to litigants in a law suit involving the complainant or to the members or staff of a congressional committee or to personnel from other government agencies. As pointed out above at footnote 194, the Alaska ombudsman's budget was cut at the urging of a state senator because the ombudsman refused to disclose information obtained in confidence. Such demands put the ombudsman on the spot. Unless the statute and common law clearly protect information obtained in confidence from disclosure, the neutrality and effectiveness of the ombudsman may be compromised.

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[212] On this point, see the account of the GAO study of the IRS PRP program *supra*, p. 71.

[213] Of the ombudsmen studied for this report, only one, the AMC ombudsman, has explicit jurisdiction to deal with whistle blower complaints.

Personnel matters, which are beyond the scope of this report, are another category of complaint which requires confidential handling. An employee is not likely to raise a concern about unfair treatment unless he or she may do so in confidence. The ombudsman may use the power to investigate to aid in the determination that a complaint raised in confidence was not lodged out of spite or malice.

The need for confidentiality is so important as to merit consideration. To an extent, it is based on some of the factors cited in Conference Recommendation 88-11.[214] Moreover, it stems from the ombudsman's need to gain and maintain the confidence of members of the public who approach the ombudsman on personal, sensitive or proprietary matters.[215]

Cases where the law requires (or permits) disclosure of sensitive information pose a difficult set of problems. Today, much of what the government does is subject to discovery by means of a Freedom of Information Act (FOIA) request, not to mention the Federal Rules of Evidence and the common law. It would defeat the purpose of an ombudsman if otherwise confidential information relating to a matter before the ombudsman were subject to disclosure by means of an FOIA request. The Conference dealt with a closely related issue in proposing a framework to protect the confidentiality of settlement negotiations conducted by mediators and other neutrals under federal agency auspices.[216] The Conference recommended that agencies explicitly state, as a matter of agency policy, that they will not seek to discover or force disclosure of a neutral's notes or other papers and information developed in the course of settlement negotiations, and that they undertake to interpret FOIA so as to avoid disclosure of settlement communications.[217]

Having said this, however, it appears that neither the complainant nor the ombudsman stand to gain anything by treating a complaint (or the particulars of the complaint) as secret or confidential in most cases. One of the ombudsman's primary means of obtaining redress where the investigation supports the claimant's position is the power to report--the ability to make public the fact that a mistake was made and not corrected--assumes that the ombudsman may elect to disclose his findings and recommendations in order to prevent similar mistakes (even if he is unable to resolve the particular dispute). Nor does there seem to be any reason to forbid preparing and disseminating statistical data as part of a report on the operations of the office or to make the case for changes to deal with recurring problems. Nor is it inappropriate for the ombudsman to publish anecdotal summaries of actual cases as a means of illustrating common problems and educating the public to the nature of the service provided as long as the identities of the persons involved are disclosed only with their consent. Indeed many ombudsmen publish annual reports which rely extensively on both statistical data and anecdotal material.[218]

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[214] Philip Harter, in his authoritative 1988 report to the Conference, has clearly and concisely discussed the legal issues in protecting mediatior confidentiality. Rather than recite his discussion, the authors refer interested readers to the report.

[215] *Ombudsman Mary Rowe Discusses, "Should an Ombudsman Testify?,"* 3 BNA ADR REPORT, June 22, 1989, p. 222.

[216] *1988 Recommendations and Reports*, Administrative Conference of the United States; Recommendation 88-11: "Encouraging Settlements by Protecting Mediator Confidentiality," pp. 60-74; Philip J. Harter, "Neither Cop Nor Collection Agent: Encouraging Settlements by Protecting Mediator Confidentiality," Id. at 219.

[217] Recommendation 88-11, see fn. 221, *supra*. While neither the recommendation itself nor the legislation implementing it specifically include ombudsmen within the class of neutrals whose settlement efforts are protected, as a matter of logic and policy, there is no basis for excluding them.

2. How is confidentiality provided (and assured)?

Confidentiality may be provided by law, rule, or agreement. All three approaches are used, all three have something to be said for them, and all three have weaknesses.

a. BY STATUTE

At the time of the early American interest in the ombudsman movement Professor Gellhorn drafted a Model Ombudsman Statute to "establish the ombudsman system in American states and cities."[219] It does not deal directly with the question of confidentially, but does provide that neither the ombudsman nor any member of his staff "shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance . . ."[220] As an example, the Nebraska ombudsman statute, which appears to be based on the model, does not to deal directly with the confidentiality issue.[221] On the other hand, the law creating the ombudsman for the province of Ontario, Canada, provides that, except in trial for perjury,

> "no statement made or answer given by . . . any . . . person in the course of any inquiry . . . before the Ombudsman is admissible in evidence against any person in any court . . ."[222]

The bill currently pending before Congress to authorize and encourage federal agencies to use mediation "and other techniques for the prompt and informal resolution of disputes," a bill that the Administrative Conference helped draft and which carries its imprimatur, protects the federal neutral from testifying or furnishing documents "concerning any matter relating to a dispute resolution proceeding."[223] While the bill does not cover ombudsmen per se, the context of the bill is broad enough to cover ombudsman proceedings. Moreover, the policy considerations are the same whether it is the ombudsman or some other neutral who is conducting the proceeding.

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[218] See, e.g., the *Annual Reports for the Alaska State Ombudsman* for 1985-87.

[219] Annotated Model Ombudsman Statute, *op. cit supra*, fn. 202.

[220] Id., at p. 172.

[221] *Nebraska Public Counsel Act*, Section 81-8, 240 to 81-8,254, R.R.S. 1943.

[222] *The Ombudsman Act*, 1975, Section 20 (6). The text of the Ontario law is published as Appendix E in Maloney, Arthur, *Blueprint for the Office of Ombudsman in Ontario*, Ontario, 1979.

b. BY RULE

The Federal Rules of Evidence (FRE) may also be used, in appropriate circumstances, to support a claim of confidentiality. For example, FRE 408 provides that an offer of compromise "is not admissible to prove liability for or invalidity of the claim or its amount," and it also provides that "evidence of conduct or statements made in compromise negotiations is likewise not admissible."[224]

The holes in Rule 408's shield make it rather uncertain protection. If nothing else is done, ombudsman offices, or better yet their agencies, should adopt procedures to help ensure confidentiality in cases handled.

c. BY AGREEMENT

It is common for parties to a dispute to agree that the content of their settlement negotiations may not be used in a proceeding growing out of the dispute. While the agreement may be effective as between them, it is less clear that it would protect their discussions and document exchanges from discovery by persons not parties to or bound by the agreement.

V. PROPOSED RECOMMENDATIONS FOR OMBUDSMEN IN FEDERAL AGENCIES

The ombudsman is an institution frequently used in other countries, and increasingly used in this country, as the office of last resort to hear and attempt to solve citizen grievances. Typically, an ombudsman may investigate selected complaints and issue a nonbinding report, with recommendations if corrections are needed. In cases involving the departments and agencies of the government, an ombudsman may deal with complaints arising from maladministration, abusive or indifferent treatment, tardiness, unresponsiveness and the like.[225] To succeed an ombudsman must have influence with, or the confidence of, higher ups, be independent, and be able to conduct meaningful investigations into a complaint without being thwarted by the bureaucracy whose work is being reviewed.

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[223] S.971, H.R. 2497, 101st Cong., 1st Sess. [cite section].

[224] Fed. R. Evid. 408. See, Note, *Protecting Confidentiality in Mediation*, 98 HARVARD L. REV. 441 (Dec. 1984) for discussion of the difficulty of assuring protection for the confidential aspects of mediation. The note points out that it is common to allow the collateral use of statements made in mediation to prove anything from agency to bias. The authors are indebted to Ms. Gitta Grank, Stanford University Law School Class of 1990, an intern at the Administrative Conference during the summer of 1989, for her assistance to us on this and many other aspects of this paper.

The experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decisionmakers with the information needed to identify and treat problem areas. Agencies that have employed an ombudsman with success in various programs include HHS, the IRS, and the Army Materiel Command.

The Conference urges the President and Congress to support the creation of an effective ombudsman in those federal departments and agencies with significant interaction with the public. In the meantime, agencies with these functions should create an office of ombudsman using existing personnel either on an agency-wide basis or to assist in the administration of particular programs.

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[225] An ombudsman may be appointed by the legislature or by the executive, with or without a fixed tenure, and with a variety of possible powers, missions, and available resources. While there is no universally accepted notion of what an ombudsman should do, the Model Ombudsman Statute states that the ombudsman "should address himself particularly to an administrative act that might be,

> 1. contrary to law or regulation;
> 2. unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;
> 3. mistaken in law or arbitrary in ascertainments of fact;
> 4. improper in motivation or based on irrelevant considerations;
> 5. unclear or inadequately explained when reasons should have been revealed;
> 6. inefficiently performed; or
> 7. otherwise objectionable. . . ."

RECOMMENDATIONS

A. Ombudsman Legislation.

(1) Congress should consider enacting legislation to establish an ombudsman in those federal agencies with major responsibilities involving significant interactions with the general public, including the following functions: licensing, tax collection, procurement, prison administration, immigration, regulation of public health or the environment, award and distribution of welfare, pension and disability benefits, subsidy and grant programs, oversight of public lands and parks, relations with American Indians and territories, the supervision or provision of health care, employment assistance and vocational training, educational and other assistance programs.

(2) The legislation should conform generally to the guidelines set forth in paragraph B, below, and should be prepared after consultation with the agencies, affected members of the public or their representatives, and the Administrative Conference.

B. Guidelines for Legislation.

(1) *Powers, duties.*

(a) The legislation should set out the functions to be performed by the ombudsman and confer the powers needed to enable the ombudsman to (i) hear complaints, (ii) conduct investigations, (iii) recommend solutions in individual cases and make recommendations for administrative and regulatory reform to deal with chronic problems and other systemic shortcomings, and (iv) speak for the public within the agency on procedures, forms, and similar issues affecting the nature and delivery of services.

(b) The legislation should require the ombudsman to submit periodic reports to the agency head and to the relevant committees of Congress summarizing the grievances considered, investigations completed, recommendations for action or improvement in agency operations, agency response, and any other matters the ombudsman believes should be brought to the attention of the public.

(2) *Qualifications, term.* The legislation should set forth the qualifications required, the tenure of office, the salary, safeguards protecting the independence and neutrality of the ombudsman, and means for assuring access to the ombudsman. The ombudsman should be a respected, senior person

known for his or her judgment, probity, and persuasiveness; and the ombudsman's salary should be commensurate with that of the agency general counsel. Congress should consider whether, in any particular agency or program, circumstances require that the ombudsman be appointed for a fixed term and removable only for cause.

(3) *Confidentiality.* The legislation should protect communications to or from the ombudsman in connection with any investigation (other than reports intended to be made public), the ombudsman's notes, memoranda and recollections, and documents provided to the ombudsman in confidence. The legislation should provide protection consistent with that recommended by Administrative Conference Recommendation 89-11, Encouraging Settlements by Protecting Mediator Confidentiality, 1 CFR §305.89-11.[226]

(4) *Judicial review, liability.* The legislation should provide that (i) no proceeding, report, or other action of the ombudsman shall be reviewable in any court, and (ii) no civil action shall lie against the ombudsman for any action, failure to act, or statement made, in discharging the ombudsman's responsibilities.

(5) *Access to agency records.* The legislation should authorize the ombudsman to request agency officials to provide information (in person or in writing) or records the ombudsman deems necessary for the discharge of its responsibilities; and should require that such information be supplied to the extent permitted by law.

C. Creation of Agency Ombudsmen.

(1) Until legislation is enacted, each federal agency that performs one or more of the functions identified as calling for the creation of an ombudsman, should consider setting up an agency-wide or program-specific ombudsman as a means of gaining experience with the concept and improving service to the public.

(2) The following agencies are among those which should consider using an ombudsman:

(a) *Social Security Administration, Office of Hearings and Appeals.* The Office of Hearings and Appeals should establish an ombudsman to assist claimants whose cases may have been mishandled or delayed in processing, and to make recommendations to the Associate Commissioner for Hearings and

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[226] As a practical matter, confidentiality guarantees in pending legislation--the *Administrative Dispute Resolution Act*, S. 971 and H.R. 2497 (101st Cong., 1st Sess.)--would likely protect communications in ombudsman proceedings.

Appeals with respect to ways to improve docket management and case handling procedures.

(b) *U.S. Customs Services.* Customs should set up an ombudsman to deal with public grievances arising out of backlogs, service gaps, damaged cargo, or other inefficient processing.

(c) *Immigration and Naturalization Service.* INS should establish an ombudsman to handle grievances from aliens, immigrants, or others in their dealings with immigration authorities.

(d) *Bureau of Prisons.* The Bureau of Prisons should establish an ombudsman to handle grievances on a last resort basis from prisoners and their families, as well as local and state officials in whose jurisdictions a federal prison happens to be located.

(e) *Environmental Protection Agency.* EPA, or any Cabinet-level department succeeding it, should combine the three existing ombudsmen for RCRA, hazardous waste matters, and small business affairs into a single agency-wide ombudsman with broad powers to respond effectively to complaints from state and local governments, businesses, and the public arising out of EPA's programs.

(f) *Department of Transportation.* Transportation should establish an ombudsman to deal with public grievances arising from government regulation of the airlines and other modes of transportation as may be appropriate.

(3) The guidelines in paragraph B should generally be followed in establishing an agency ombudsman.

(4) An agency with an ombudsman should explicitly indicate that as a matter of policy it will not seek to discover or otherwise force disclosure of an ombudsman's notes, memoranda or recollections or of documents provided to the ombudsman in confidence.

D. Procedural Issues.

(1) Before announcing a conclusion or recommendation that criticizes an agency or any person, the ombudsman should ordinarily consult with that agency or person.

(2) When publishing a report or opinion adverse to an agency or person, the ombudsman should ordinarily include the substance of any statement of the agency or official regarding the complaint or the ombudsman's report or recommendations.

(3) An agency with an ombudsman should take effective steps to ensure that persons who deal with the agency are aware of the existence, purpose, and availability of the ombudsman service. These steps could include active

campaigns to inform the public of the service through mailings to persons with whom the agency deals, press briefings and releases, posters in agency offices used by the public, printed and video materials, and the like.

APPENDIX A

OMBUDSMAN MODELS IN OTHER COUNTRIES

Sweden was the first country to establish a constitutional ombudsman in 1809, appointed by the legislature for a four-year term (and eligible for reappointment). Similar functions were previously performed by a "chancellor of justice," an official similar to an attorney general, who was an appointment of the King and still exists today. In fact, the term ombudsman comes from a Swedish word meaning "the people's representative." As soon as a complaint is filed with this ombudsman, it becomes part of the public record.[227] This position was also given the power to initiate prosecution of public officials, though it has rarely occurred.[228] Originally in Sweden, the ombudsman's activities were concerned with the courts and police, but with the growth in the bureaucracy in this century, the focus shifted. In 1915, a separate military ombudsman was created. In 1968, a third national ombudsman was established for the courts, police and prisons. In 1976, a fourth ombudsman was implemented to focus on administrative matters such as taxation and the execution of judgments. All four national ombudsman share office space and support staff, with one serving as the administrative head. An example of a case in which the Swedish ombudsman intervened involved a man who was incorrectly placed in a mental institution.[229]

Finland established its national ombudsman in 1919 when the country formed itself as a republic, ending over a century of domination by the Russian Empire. (Prior to that it had been under Swedish rule, and Finland therefore developed a similar political system.) Like the Swedish model, the Finnish ombudsman has the authority to monitor judicial decisions for fairness.[230] This ombudsman is also legislatively appointed for a four-year term. (Finland also has a chancellor of justice who is appointed by the president of the republic, but it is more powerful than the one in Sweden, and much more powerful than the Finnish ombudsman.) In the early 1930's, the ombudsman assumed jurisdiction over complaints from prisoners and the military from the chancellor of justice.

Norway adopted an ombudsman specifically for the armed services in 1952. In 1962, however, Norway broadened this appointment by creating a parliamentary ombudsman with a four-year term for all the bureaucracy. At the national level, Norway also has three executively appointed ombudsman for (1) consumers, (2) discrimination and equality issues, and (3) for children,[231] the newest one, established in 1981. The Norwegian ombudsman models give greater significance to the confidentiality of the ombudsman's investigations, and give the ombudsman less power to criticize the substance of official policy as opposed to its fairness.[232]

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[227] Zagoria, *The Ombudsman*, p. 69.

[228] Id., at p. 59.

[229] Rowat, *The Ombudsman Plan*, p. 7.

[230] *Public Ombuds Trade Notes*, ALTERNATIVES, New York: Center for Public Resources, Vol. 7 & No. 10, October 1989, p. 175.

Denmark's federal ombudsman was first appointed in 1955 with a four-year term, and like Sweden's, is given the power to initiate prosecution of all public officials except judges. Three ministries each assign an official to work for the ombudsman for two years giving the ombudsman's office a greater diversity of expertise.[233] In one case where the Danish Tax Appeal Board was criticized in the press for its delayed operations, the ombudsman investigated its procedures and proposed changes for improvement.[234]

In 1962, **New Zealand** created a national ombudsman chosen by the governor-general after consultations with the majority and opposition political parties. The ombudsman serves for a five-year term. It has local branch offices and, in 1976, was given jurisdiction over cities. At that time, there were three national ombudsman with one serving as the head. Since 1980 there have been only two national ombudsman, one of whom deals specifically with municipalities. A typical ombudsman's case in this country involved a woman who became unemployed and complained that officials in the local office of the Labor Department caused her hardship by advising her incorrectly about her entitlement to unemployment benefits.[235]

Australia established its national ombudsman in 1977, with a seven-year term. In 1981, a deputy federal ombudsman for military affairs was created. In the same year, its powers were expanded to include the federal police, and in 1982, freedom of information complaints. All six of the states in this country also have their own ombudsman. A typical Australian case involved complaints about the technical service of the telephone system operated by the state telecommunications commission.[236]

Great Britain created a "parliamentary commissioner for administration," who acts much like an ombudsman, in 1967. Complaints must be brought to this ombudsman through sponsorship by a member of parliament. The commissioner, or ombudsman, is appointed by the Queen and can only by removed by both houses of Parliament. In 1973, separate Health Service Commissioner ombudsmen were created for England, Wales, and Scotland. Since then, these posts have also been held by the parliamentary commissioner. In 1969, Northern Ireland set up a separate office of the "commissioner for complaints" as well as a "parliamentary ombudsman." Since 1971, however, the commissioner for complaints has also served as the parliamentary ombudsman. Because the British central government is much more responsible for local affairs than is the case in the other countries, this national ombudsman often deals with a broad range of issues. For example, the "parliamentary commissioner" often must deal with complaints about the building of prisons close to communities and other problems of prison administration.[237] England also recently created an ombudsman for the insurance industry.

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[231] Zagoria, *The Ombudsman*, 1988, pp. 80-84.

[232] Rowat, *The Ombudsman Plan*, 1985, pp. 30-31.

[233] Zagoria, *The Ombudsman*, 1988, p. 57.

[234] Rowat, *The Ombudsman Plan*, 1985, p. 33.

[235] Id., at p. 35.

[236] *Commonwealth Ombudsman & Defense Force Ombudsman Annual Reports: 1987-1988*, Australian Government Publishing Service, Canberra, 1988, p. 41.

Austria's national ombudsman was legislatively created in 1977. This office is made up of three "people's attorneys" who are elected by the Parliament from political nominations from each of the three political parties. They serve for six-year terms, rotate the chairman's position and are usually former members of the legislature. Each ombudsman is responsible for different administrative agencies; and they often act as a commission on major cases.

In 1966, the city of Tel Aviv/Jaffo established an "Office of Public Complaints." By 1971, there was such an interest to have a similar function at the national level that an amendment to **Israel**'s comptroller's law formalized the complaint handling function of this position by also naming a "public complaints commissioner." The current State Ombudsman is a former Supreme Court Justice. Similarly, a 1972 amendment provided for a military ombudsman appointed by the defense minister with the approval of the related defense committee of the legislature. In 1973, an Office for Public Complaints, or police ombudsman, was also created. In 1980, the police and prison officers' complaints commissioner was appointed and housed within the Ministry of the Interior with the approval of the related legislative committee. A recent case involving the state ombudsman dealt with a complaint that the police did not test a driver for drunkenness after he had caused a fatal collision.[238]

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[237] Ablard, Charles D., *The Parliamentary Commissioner - The Ombudsman for Parliament*, Occasional Paper #40, Edmonton, Alberta, Canada: THE INTERNATIONAL OMBUDSMAN INSTITUTE, June 1987, p. 4.

[238] Siegal-Itzkovich, Judy, *The Citizen Has A Gripe: The Ombudsman Received 5,000 Complaints Last Year of Mistreatment by the Authorities* (The Community), *The Jerusalem Post-*International Edition, February 11, 1989, p. 19.

Portugal created an ombudsman's office by decree in 1975. This position is appointed by the President of the Republic from a list submitted by the Prime Minister and the Minister of Justice. The 1976 constitution, however, provided for a "Provedor de Justia," elected by the legislature for a four-year term. This position has two additional responsibilities: (1) serving on a council which is concerned with the appointment and removal of judges, and (2) making recommendations on the constitutionality of laws and regulations.[239]

Spain has a national ombudsman, or "Defender of the People," authorized in a provision of its 1978 constitution; this is an appointment by the "Cortes," the Spanish Parliament, and is for a five-year term. Implementing legislation was enacted only in 1981. The Congress and the Senate appoint special committees which choose the candidates for the post, who is selected by the full Congress, with ratification by the Senate. The "Defender of the People" has authority to investigate all administrative activity, including that of ministers, and may refer matters to the constitutional court.[240]

In **France**, legislation to create a national ombudsman was introduced as far back as 1970 but it was not until late 1972 that the head of the government decided to appoint a "mediateur" for a six-year term. Complaints had to be forwarded by members of the legislature, and usually former legislators serve in the post. The mediateur receives no compensation. This scheme is very decentralized and uses representatives in each district in France. The mediateur makes proposals for administrative and legislative reform, and was instrumental in the adoption of legislation providing greater access to administrative documents.[241]

Some countries failed to set up national ombudsman but did establish state or regional level ombudsman. **India** attempted to legislate an ombudsman program twice in the early and late 1970's, but both attempts failed. Ombudsman do however exist in four of the states in that country. **Italy** had discussed creating an ombudsman at the national level, but currently only four regions have them. Legislation creating a federal ombudsman in **Switzerland** dates back to the early 1960's, but currently only one state in that country has an ombudsman.

Federal ombudsman proposals in the 1960's also occurred in **Greece**, **Hong Kong**, **Indonesia**, **Malaysia**, the **Netherlands**, **Ireland**, and **Singapore**, but none of these plans were adopted.[242]

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[239] Rowat, *The Ombudsman Plan*, 1985, p. 143.

[240] Id., at p. 150.

[241] Id., at p. 142.

[242] Frank, Bernard, *The Ombudsman & Human Rights*, ADMINISTRATIVE LAW REVIEW, Vol. 22, No. 3, April 1970, pp. 483-486.

During the 1960's, variations on the classic Scandinavian ombudsman model developed all around the globe. An ombudsman-like commission office was set up in **Tanzania**[243] and **Guyana** in 1966. Other countries with similar commission type ombudsman schemes include **Papua New Guinea**, **Nigeria**, and **Zambia**. The national ombudsman in **Fiji** is appointed by the governor-general with the consent of the prime minister and political party leaders for a four-year term. In **Mauritius**, the national ombudsman was established in 1967 and is appointed after consultations between the prime minister and leaders of the opposition. **Ghana**, **Jamaica**, **Trinidad & Tobago**, and the **Philippines** have also introduced national ombudsmen. The constitutions of **Bangladesh**, **Dominica**, the **Solomon Islands**, **Sri Lanka**, **St. Lucia**, and **Zimbabwe** make provisions for the establishment of an ombudsman as well. In some of these underdeveloped countries, communal tension often occur as a result of discrimination against a particular race or tribe. In such countries, the ombudsman provides an impartial source of redress for individuals and may promote justice for minority communities.[244]

Poland is the first eastern bloc country to appoint an ombudsman. There has been some recent discussion about creating a national ombudsman in **Argentina**, **Costa Rica**, and **Hungary**.[245]

Closer to home, **Canada** has special ombudsmen at the federal level for prisons, freedom of information cases and language problems. For example, the Commissioner of Official Languages acts as the ombudsman for complaints from citizens who feel their rights under the Official Languages Act, which requires bilingualism in the Parliament and federal government, have not been respected by a particular federal agency.[246] Also, nine of the ten provinces have legislatively created ombudsman, the first created in Alberta in 1967. A significant portion of complaints to the provincial ombudsmen involve housing issues, including damages caused to property by government programs such as highway construction.[247]

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[243] Ombudsman serve on either the Committee for the Enforcement of the Leadership Code or the Permanent Committee on Enquiry.

[244] Scott, Ian, "Introduction" (Chapter 17: *Ombudsman in Underdeveloped Countries*), in Caiden, Gerald E., Ed., INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS, Westport, CT: Greenwood Press, 1983, p. 311.

[245] *Public Ombuds Trade Notes*, CPR ALTERNATIVES, p. 175.

[246] Skuce, Robin, *The Commissioner of Official Languages*, (Chapter 2: "Canada"), Caiden, Gerald E., Ed., INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS, Westport, CT: Greenwood Press, 1983, pp. 35-36.

[247] Frank, Bernard, *Canada's Official Dispute Settlors*, Occasional Paper #14, Edmonton, Alberta, Canada: INTERNATIONAL OMBUDSMAN INSTITUTE, December 1981, p. 14.

APPENDIX B

FEDERAL OMBUDSMAN

Lewis J. Ashley

Department of Defense

Army Materiel Command

The Army Materiel Command's headquarters office has had an ombudsman for the last four years. This command provides materiel and related services to the Department of the Army, its other commands, and to other domestic and foreign agencies. This ombudsman handles mainly external complaints, but also deals with some internal agency matters. Typical disputes involve contractors who phone in, write, or visit alleging unfair procurement processes, and whistleblowers with allegations of legal violations resulting in waste, fraud and abuse. This ombudsman also does fact-finding, forms ad hoc task forces to do investigations, and makes recommendations.

Mark Lumer

Department of Defense

Army Materiel Command

Communications/Electronics Subcommand

In May of 1988, the U.S. Army Communications-Electronics Command at Fort Monmouth, NJ established a solicitation ombudsman. This command buys communications and electronics equipment for the Army. Its ombudsman resolves disputes over procurement bids and awards, post award claims, and Freedom of Information (FOIA) requests, as well as congressional inquiries. Unlike the classic ombudsman, this individual has authority to intervene and change bureaucratic decisions rather than merely serving an advisory or facilitation function.

Department of Defense

Department of the Navy

The commanding officer of each ship, station, or local command is authorized to appoint a family ombudsman who acts on behalf of military families with the commanding officer. Most are civilian wives who volunteer to help resolve personal problems of the families left behind in the home ports.

Philip M. Foisie

Department of Defense

"Stars & Stripes" newspaper

"Stars & Stripes" newspaper, published for U.S. military personnel stationed abroad, recently appointed an ombudsman to resolve censorship disputes. This position is housed in the Office of the Assistant Secretary of Defense for Public Affairs.

Department of Health & Human Services

Food & Drug Administration

The Food and Drug Administration of the Department of Health and Human Services recently proposed the establishment of an ombudsman in response to disclosures of problems with regulation of the generic drug industry. There will be one head ombudsman with a staff of nine spread around various field or branch offices. They will address questions of "fairness" in a variety of areas, including the generic drug area. (Currently, the FDA does not have its own inspector general to monitor agency cases of fraud, waste and abuse.)

Department of Health & Human Services Supported

State Long Term Care Ombudsman

Legislation for federal financial assistance to most state and regionally supported facilities for long-term care for older individuals (administered by HHS) mandated the establishment of an ombudsman program in 1978. The Federal Older Americans Act of 1978 amendments required the appointment of ombudsmen to protect nursing home occupants from abuse in institutions receiving federal income. By 1983, funds were available to establish ombudsman in most states, charged to investigate complaints, settle disputes, monitor related legislation, regulation and policy, provide public information, and train program volunteers. The 1981 Amendments to the Older American Act broadened the mandate of the law to include board and care facilities as well.

Damon Holmes

Department of the Treasury

Internal Revenue Service

Taxpayer Ombudsman

An Assistant to the Commissioner of the Internal Revenue Service in the Department of the Treasury acts as the Taxpayer Ombudsman and administers its regional Problem Resolution Program (established in 1977). This federal ombudsman trains regional personnel in the handling of taxpayer complaints, but also performs the role of advocate for the taxpayer within the IRS.

Brian Gimmlet

Department of the Treasury

U. S. Secret Service

The U.S. Secret Service in the Department of the Treasury currently has two ombudsmen. They have been in place for two years and only operate in the uniformed division. The ombudsmen serve in a collateral duty position. One is a supervisor, as well as agent, who is involved in program and policy matters. The other ombudsman also serves as a lieutenant and has been with the organization for 19 years. The ombudsmen deal with internal employee problems of both a personel and professional nature. In the fall of 1989, the program expanded service-wide and now includes 9 ombudsmen.

Karen Brown

Environmental Protection Agency

Office of Small & Disadvantaged Business Utilization

Asbestos Ombudsman

The Environmental Protection Agency has an Ombudsman in its Office of Small and Disadvantaged Business Utilization (OSDBU). This program was created in the late 1970's to assist minority and small businesses in obtaining contracts with the EPA. The original ombudsman's office was established in 1982. Congress later mandated that EPA create an asbestos ombudsman and in April of 1988, this function was assumed by the Small Business Ombudsman's office.

The complaints are mainly in the area of regulatory compliance. This office operates a hot-line and offers technical assistance and referrals. Three engineers and an economist are currently on staff. The ombudsman often acts as a mediator between the small business community and EPA. This ombudsman also acts as an advocate by providing the small business perspective in the development of new agency regulations.

Robert Knox

Environmental Protection Agency

Resource Conservation & Recovery Act

Hazardous Waste Ombudsman

In 1984, the Resource Conservation and Recovery Act directed the Administrator of Environmental Protection Agency to establish an ombudsman office to resolve hazardous waste disputes under the Superfund program. The ombudsman's office was only established in May of 1984 and was supposed to function until November of 1986, but it is still in existence today. It mainly receives complaints from attorneys representing clients involved with EPA officials. The most common grievance is that the agency is slow in responding to inquiries concerning pending agency action or technical questions. The ombudsman acts as an intermediary between the public and the EPA on issues relating to hazardous waste, "community right to know" matters, underground storage, superfund and RCRA. As an agency insider, this ombudsman, on behalf of the public, brings attention to a matter, that might have been ignored or overlooked. This office is located in the Office of Solid Waste and Emergency Response.

Stillman K. Taylor, Jr.

Federal Deposit Insurance Corporation

Division of Federal Savings & Loan Insurance

The Office of Federal Savings and Loan Insurance (formerly the Federal Savings and Loan Insurance Corporation-FSLIC) which is now part of the Federal Deposit Insurance Corporation, insures the safety of savings in thrift and home financing institutions. In March 1988 FSLIC named an ombudsman, with a four-member staff, to deal with complaints from the public and provide information and referral services. This ombudsman serves as a mediator for thrift assistance agreement disputes. Due to increased numbers of thrift failures and the complexity of regulations, the Office of Communications needed relief from calls from attorneys, investors and brokers. This office receives inquiries from investors seeking information on buying assets, property management, participation loans, and receiverships. This office also does research for the agency and coordinates an orientation program for new employees. Intended to increase the agency's responsiveness to the public, the ombudsman's office normally responds to inquiries within a day and resolves most cases within a week.

Frank Swain

Small Business Administration

Since 1976, the Small Business Administration has been providing businessmen with an ombudsman, through its Chief Counsel for Advocacy, to represent the interests of small businesses before other federal agencies and in Congress when proposed policy changes may affect them. It also provides an "answer desk" to respond to inquiries from the public, usually small businesses with problems with the government.

This program has been facilitated by the passage of the Regulatory Flexibility Act which requires federal agencies to anticipate the effects of rules they promulgate on interested parties, especially smaller entities. The office of advocacy monitors whether federal agencies are complying with this mandate.

Robert Henry

U.S. Information Agency-Voice of America

Through its "Voice of America" program, the U.S. Information Agency provides international radio broadcasts of U.S. news and entertainment. Preliminary findings from a GAO audit suggested that existing channels of communication between labor and management were not always effective. An ombudsman was recommended to improve upon this by providing more neutral and confidential assistance. In 1988, this agency established such an internal ombudsman to resolve primarily managerial and employee grievances. This ombudsman facilitates the resolution of conflicts, makes recommendations, and seeks the director's intervention in rare cases.

INTERNATIONAL & QUASI-PUBLIC FEDERAL

Eugene Herbert

International Monetary Fund

The International Monetary Fund, made up of member donating countries similar to the U.N., has an ombudsman in its executive office in Washington, DC. This position has existed for ten years and handles primarily in-house employee grievances.

Bruce A. Quinn

Panama Canal Commission

The 1979 act which implemented the Panama Canal Treaty established a commission with an Ombudsman's Office. This offices provides services to employees of U.S. government agencies located in the former Canal Zone area. The commission ombudsman resolves jurisdictional disputes which have arisen out of the implementation of this treaty, primarily involving grievances from U.S. employees and their dependents. While sovereignty over the Canal passed from the U.S. to Panama, U.S. employees there are subject to U.S. laws and are immune from the jurisdiction of the government of the Republic of Panama. He or she resolves disputes as they relate to U.S. law but, if the case involves Panamanian law, the ombudsman must refer it to the appropriate bi-national committee established by the Treaty.

Ellen Spring

Pension Benefit Guarantee Corporation

The Pension Benefit Guarantee Corporation is a self-financing government corporation providing coverage for most private sector defined benefit pension plans. In February of 1989, it created a test program which established a half-time ombudsman position. This temporary position was designed to handle complaints from plan participants and to make recommendations on the utility of a permanent program. The plan participants' complaints are mostly about actions of PBGC employees, agency procedures, or policies which are perceived to be ineffective or which otherwise require some attention. Complaints also come from congressional offices, generally dealing with issues in the benefit payment area. This PBGC ombudsman position is only temporary and is also a collateral duty position in that the ombudsman also serves a policy analyst half of the time. She is housed in the office of, and is able to make recommendations directly to, the executive director, and in some ways may be said to function as a special assistant to the executive director. The future status of this ombudsman program is uncertain.

Chandra Heilman

Smithsonian Institution

In the late 1970's, the Smithsonian Institution created an ombudsman position mainly to resolve museum employees' complaints. The initiative came from upper management as a result of the rapid growth of the size of the institution and the problems which resulted. This quasi-public organization is supported by private funding as well as by the federal government.

Vincent Riley

World Bank

The World Bank, the International Bank for Reconstruction and Development, is a quasi-public international organization funded in part by the U.S. federal government which assists in promoting economic advancement in developing nations. It has an in-house ombudsman who acts to resolve primarily internal personnel problems. This ombudsman has been with the agency for many years and this position is viewed as a preretirement step which allows for greater independence.

Report for Recommendation 90-3

Risk Communication as a Regulatory Alternative For Protecting Health, Safety and Environment

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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Introduction

Risk communication has become an important component of regulatory policy in the United States and other industrial nations for the social control of hazardous technologies. Mandated by several laws and regulations, risk communication is now being used to mitigate and prevent technological risks to workers, community residents and product users.[1]

The term "risk communication" is commonly used to describe procedures by which public agencies and private firms produce and distribute information about the hazardous attributes and risk consequences of technological activities and products to exposed and vulnerable persons.[2] Thus, risk communication includes traditional regulatory requirements for industrial labeling of dangerous products (e.g., pesticides); agency provision of environmental impact statements on proposed projects to the public; agency disclosure of records and data regarding risk issues to "any person" invoking the federal Freedom of Information Act; and the voluntary provision of risk information by agencies to the public to promote risk avoidance (e.g., household radon hazards).[3]

However, over the past decade, Congress and federal agencies have acted to create another form of risk communication which essentially requires industrial firms to communicate directly with persons at risk, or with certain designated representatives of such persons. These enactments are the "right to know" laws and rules which have raised special issues of administration and enforcement. They have also informed and aroused the public and stimulated new initiatives in legislative, regulatory and judicial forums to curb risky technological activities. And they have displaced traditional design and performance standards as the primary means of coping with certain technological hazards.

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[1] *See* generally, Symposium Proceedings, "Multinational Corporations and Their New Responsibilities to Disclose and Communicate Risk Information," *Boston Univ. Int'l. Law Jnl.*, v. 6, n.1 (spring 1988); which describes and evaluates risk communication developments in the United States, the European Community, the United Nations and various international and private industrial organizations. *Also, see* M. Baram, "Corporate Risk Management and Risk Communication in the European Community and the United States," *Harvard Jnl. Law and Technology*, v. 2 (spring 1989) 85.

[2] "Risk communication" generally denotes the disclosure of both hazard and risk information. It should be recognized that hazard information differs from risk information. Hazard information pertains to the dangerous attributes of an activity in the abstract sense (e.g., the carcinogenicity of a chemical); whereas risk information includes the estimated effects of the hazards on human health or the environment under specified conditions of exposure. Therefore, risk information may include data on emission levels, exposure circumstances, and potential biological responses. More succinctly, "The hazard presented by a substance is its potential to cause harm . . . the risk from a substance is the likelihood that it will harm you in the actual circumstance of use . . . ,"*Hazard and Risk Explained*, Health and Safety Executive, London, U.K. (1988). For further discussion, see L. Jourdan, "Information on Hazards of Substances at the Individual Workplace," Conseil European des Federations de L'Industrie Chemique (CEFIC), Brussels, Belgium (April 1987); and M. Baram, "Risk Communication: Moving From Theory to Law to Practice," in *Effective Risk Communication*, note 3 *infra*.

[3] *See* V. Covello, D. McCallum, M. Pavlova, "Inventory of Government Risk Communication Programs," in *Effective Risk Communication*, Plenum Press (1989).

The purpose of this study is to evaluate these recent federal programs which rely on industrial risk communication as an enforceable policy instrument to protect workers, community residents, and product users from specified hazards; and to develop findings and recommendations for improving the design and administration of federal risk communication programs.

To achieve these goals, three major federal programs have been evaluated: OSHA's "Hazard Communication Standard (HCS) or "Worker Right to Know" Rule,[4] the Emergency Planning and Community Right to Know Act (EPCRA)[5] implemented by EPA; and FDA's Patient Package Insert Program (PPI),[6] which was terminated after a brief experiment. The resultant findings and recommendations are divided into two categories: Those which apply to existing risk communication programs, and others which are of generic applicability to future federal use of risk communication as a regulatory alternative.

I. Concepts and Premises

Diverse interest groups support use of industrial risk communication as a regulatory device to prevent technological harms. But when this support is examined, differing concepts of how such risk communication should work, and differing policy rationales and premises, are encountered.

Policy analysts and legislators have supported industrial risk communication as a regulatory reform which has the potential to reinforce traditional approaches to regulating risk (such as standard setting), to remedy deficiencies in agency performance, and to enlarge agency capability for dealing with risks which would otherwise elude its grasp.[7] For example, by using OSHA authority to promulgate its HCS requiring employers to communicate risk information to employees, workers are informed and can be expected to exercise greater care to avoid harm, thereby reinforcing OSHA's prescriptive standards and the "general duty" of employers to maintain a safe workplace. The generic HCS also remedies to some extent OSHA's inability to set prescriptive standards and exposure limits for all hazardous substances in the workplace because of resource limitations.[8] Finally, the rule enables OSHA to address risk problems which are not amenable to the "substantial evidence" and "significant risk" criteria the agency must meet when it uses a prescriptive standards approach.[9] Environmentalists, labor, and consumer groups also support industrial risk communication as a regulatory reform because of its potential for improving agency programs and achieving greater reduction of risk.[10] But in addition, these interest groups promote such communication because it is apparent that the information to be disclosed will enhance their ability to petition regulatory agencies, lobby legislators, and litigate in regulatory and judicial forums for preventive standards, and to secure compensation for personal injuries and injunctive relief.[11] This empowering function of risk communication is now being demonstrated as environmental groups use recent industry disclosures of toxic air pollutant emissions, mandated by EPCRA, to petition and lobby for new air toxics standards to protect community health.[12]

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[4] 29 CFR §1910.1200 (1988), originally promulgated with a 60 page explanatory preamble at 48 Fed. Reg. 53,280 (1983).

[5] Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§11,001-050 (Supp. IV 1986), which is designated as the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA").

[6] 21 CFR §203 (1980), originally promulgated at 45 Fed. Reg. 60,753 (1980), and officially revoked at 47 Fed. Reg. 39,147 (1982).

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[7] *See* for example, P. Harter, G. Eads, "Policy Instruments, Institutions and Objectives: An Analytical Framework for Assessing "Alternatives" to Regulation," *Admin. Law Review*, v. 37 (1985) 221; M. Baram, et al, *"Alternatives to Regulation,"* D.C. Heath (1982) at 120; R. Mayer, F. Nicosia, "Consumer information: Sources, Audiences, and Social Effects," in *Protecting Consumer Interests*, R. Katz, ed., Ballinger (1976) at 41; and various papers in *Effective Risk Communication*, note 3 *supra*.

[8] *See* OSHA's HCS preamble, note 4 *supra*.

[9] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). Also *see* note 65 *infra* and accompanying text.

[10] *See* for example, S. Krimsky, A. Plough, Executive Summary, Project Report on *Improving Risk Communication*, U.S. EPA (Feb. 1988); R. Kasperson, "Six Propositions for Public Participation and Their Relevance for Risk Communication," CENTED Reprint 54, Clark University (Nov. 1986); "Strenghtening Worker/Community Right to Know," Policy Statement 8714, Am. Public Health Association.

[11] *Id.* Also see H. Otway, "Experts, Risk Communication and Democracy," *Risk Analysis Jnl.* v. 7, n. 2 (1987) at 125; C. Chadd, J.O'Malley, "Superfund Amendments Offer Hope for Plaintiffs in Toxic Tort Actions," *Natitonal L. Jnl.* (March 21, 1988) 16; A. Babich, "Enforcement of EPCRA: A Practical Guide for Citizens, States and Local Governments," *Toxics Law Rptr.* (Sept. 7, 1988) 463; D. Hayes, "Superfund Spillover: Title III and ATSDR," *Toxics Law Rptr* (Aug. 26, 1987) 377; K. Gray, D. Pike, "Turning on the Lights: Reporting Under SARA Title III Illuminates Tort and Environmental Liabilities," *Environmental Professional Jnl.*, v.11 (1989) 56.

Industrial support has come about reluctantly. Most firms have perceived risk communication as a threat to their trade secrets and management autonomy, and as fuel for public anxieties and new controversies over risk which can lead to more stringent and costly regulatory requirements, tort litigation, and loss of reputation.[13] However, as state and local "right to know" laws have proliferated,[14] many firms now look to federally-established risk communication programs for uniform requirements which would be less troublesome to their commercial activities which are conducted on a national scale.

Several large firms which produce hazardous chemicals have now discovered that risk communication actually presents new opportunities for improved loss control and greater profitability. These major producers are now using HCS and EPCRA requirements as frameworks for voluntarily providing additional safety information and advisory services to their "downstream" customers. This is being done to reduce the incidence of risks arising from customer use of their products, and to thereby reduce the current high volume of "upstream" litigation against them by their customers and injured persons (usually customer employees claiming their injuries arose from the producer's failure to warn). These firms now engaging in the voluntary communication of risk information to prevent risk and liability have also found this to be an effective feature for marketing their chemical products and gaining customer loyalty.[15] Industrial risk communication also has the extraordinary characteristic, for a regulatory device, of satisfying very different political viewpoints about how to deal with technological hazards in a democratic system, and this may explain why it enjoys such broad political support. For proponents of the "new federalism" who aim to reduce the federal role in solving social problems and shift responsibility to state and local levels of government.[16] EPCRA channels industrial risk information to state and local boards and mandates that they address industrial accident hazards.[17] For conservatives who have long argued that market forces are a more cost-effective and suitable means for influencing corporate activities, but who have had to contend with liberal opponents who argue that the market is ineffective due to inadequate information, the HCS and EPCRA programs have cured this deficiency.[18] For Jeffersonians and other critics of governance by experts, and who premise democracy on the voluntary exercise of choice by an informed citizenry, the risk communication programs have restored some measure of power to the people.[19] And as noted earlier, liberals have favorably viewed industrial risk communication as a regulatory device which empowers them.

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[12] "Section 313 Reports of Toxic Air Emissions Said to Reveal Need for Pollution Prevention," *Environment Reporter* (May 19, 1989) 154; "Data Said to Reveal Need for Pollution Prevention," *Right to Know Planning Guide* (Jan. 1989) 4.

[13] M. Baram, note 1 *supra*; D. Hayes, note 11 *supra*.

[14] Over twenty states have worker right to know laws, and a similar number have recently enacted community right to know laws or amendments. Numerous municipalities also have enacted community right to know ordinances. *See* "Digest of State Right to Know Laws" in *Right to Know Planning Guide*, Bureau of National Affairs, Inc.

[15] Dow Chemical is the leading practitioner of voluntarily "going beyond regulatory requirements" in transmitting risk information to its distributors and customers as part of its Product Stewardship Program and marketing efforts. Other chemical producers are now following suit. Personal communications (1988, 1989).

There are less obvious but possibly even more fundamental sources of support for industrial risk communication, which may further explain its widespread appeal. One of these is the moral view that one with knowledge that his action is creating a latent risk for another has a responsibility to disclose this information to enable the vulnerable person to avoid the harm, or choose to be exposed to it on a voluntary and informed basis. This view is imbedded in the common law[20] and is most concretely expressed in the duty to warn theory of products liability law which, since the advent of asbestos litigation a decade ago, has become the primary basis for securing recovery from industry for product-related harms.[21] Risk communication programs can, therefore, be viewed as a regulatory codification of this common law principle, and it may be more than mere coincidence that the "worker right to know" movement progressed concurrently with the flood of asbestos suits by diseased workers who claimed that asbestos firms had failed to warn of their product's foreseeable hazards, and worse, had done so willfully, in many instances.[22]

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[16] *See The Status of Federalism in America*, Domestic Policy Council, Office of the President (1987); and R. Manley, "Federalism and Management of the Environment," *Urban Lawyer*, Am. Bar Assoc., v. 19, n.3 (1987).

[17] EPCRA establishes new state and local units of government and expressly mandates their responsibilities for emergency response planning. As for the inspection of industrial facilities for accident hazards and the taking of preventive regulatory measures. EPCRA is silent. Since EPA has no clear authority under any of its statutes to regulate industrial safety, but state and local governments have long used their "police powers" to inspect and regulate plants to protect communities from accident hazards, the reasonable inference is that Congress intended that accident prevention authority remain exclusively with state and local governments. Congressional intent can also be inferred, in this case, from its rejection of the competing approach set forth in Congressman J. Florio's bill, the proposed Chemical Manufacturing Safety Act, H.R. 965, 99th Congress, 1st Sess. (1985), which would have created a new federal regulatory program to regulate safety in facilities producing or using hazardous chemicals.

[18] See discussion in S. Breyer, *Regulation and its Reform*, Harvard Univ. Press (1982) at 161-164; and R. Posner, *Economic Analysis of Law, 2d ed.*, Little Brown Co. (1977) at 271-281

[19] P. Stenzel, "The Need for a National Risk Assessment Communication Policy," *Harvard Env. L. Rev.*, v. 11, n.2 (1987) at 381-413, quoting among others, Thomas Jefferson: "If we think [the people are] not enlightened enough to exercise their control with a wholesale discretion, the remedy is not to take it from them, but to inform their discretion." T. Jefferson letter to Wm. Jarvis (Sept. 28, 1820).

[20] For example, in the nineteenth century, it became established in tort law that the operator of a railroad has the duty to signal before crossing a public road in order to warn persons at the intersection. An operator who failed to signal would be liable for resulting injuries. H. Buswell,

Another fundamental support for industrial risk communication can be found in the now widespread recognition that the ultimate risk issue, "how safe is safe enough," is essentially trans-scientific and subjective, and cannot be conclusively or satisfactorily answered by experts for a pluralistic society like the United States.[23] As a result, agency attempts to use technical expertise to set quantitative risk limits in prescriptive standards have failed to satisfy the public, and reliance on public opinion informed by risk communication can be viewed as a more acceptable method of risk management. Industrial risk communication also fits comfortably in the mosaic of American regulatory law which includes other communication requirements such as the Freedom of Information Act (FOIA),[24] EPA labeling requirements for pesticides,[25] OSHA rules on worker access to employer-held medical and exposure records,[26] and the numerous reporting requirements found in most statutes which authorize social and economic regulatory programs. These laws and rules, which afford various duties to disclose and rights of access to information, reflect persistent public anxieties about technologies, traditional

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The Civil Liability for Personal Injuries Arising Out of Negligence 303, (2d ed. 1899). Also see, "Appendix: Product User Risks and Communication Requirements in the United States" in M. Baram, *Corporate Risk Management: Industrial Responsibility for Risk Communication in the European Community and the United States*, Commission of the European Communities, Report EUR 11555 EN (1988).

[21] The seminal decision is *Borel v. Fibreboard Paper Products, Inc.*, 493 F.2d 1076 (5th Cir. 1973). Also see V. Schwartz, R. Driver, "Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory," *Cincinnati L. Rev.*, v. 52 (1983) 38.

[22] *See* P. Brodeur, "The Asbestos Industry on Trial," four-part series in the *New Yorker*, (June, July 1985).

[23] For variations on this theme, *see* H. Otway, note 11 *supra*; S. Krimsky, note 10 *supra*; R. Kasperson, note 10 *supra*; and A. Rip, "Experts in Public Arenas," in *Regulating Industrial Risks*, H. Otway, M. Peltu, eds., Butterworth's Ltd., London (1985).

[24] 5 U.S.C. §552 (1982).

[25] 40 CFR 162.10.

[26] 29 CFR 1910.20 (1988).

mistrust of government and industry, and historical commitment to participatory government, aspects of American culture which also support industrial risk communication.

Finally, increasing the public's right to risk information now appears to be an irreversible process because it is constantly stimulated by several forces at work in modern society. These include rapid scientific progress which enables the discovery of new risks, aggressive media coverage of risk issues, industrial use of safety in promoting products against competitors, and growing public concern about technological risks as threats to health and well-being. These are dynamic forces which increase the public appetite for risk information.[27]

Where will industrial risk communication lead? Will it stimulate new market forces as persons exposed to hazardous technologies and products take more effective risk avoidance and other self-help measures? Will it promote greater public participation in government decision-making to reduce risks to levels deemed socially "appropriate?" Will it enhance the use of tort litigation to secure injunctive relief and compensation for injuries and anxieties, and thereby deter risky technological activities?

Or will the very availability of numerous communication programs paradoxically instill in the public greater confidence and disinterest in industrial and agency decision-making, and lead to diminished public activism? Will risk communication be used by industry and agencies to manipulate the public into acceptance of risky technologies? Will it overload or confuse the public and thereby be blunted as an instrument for reducing risk?[28]

Despite these diverse views and unanswered questions, this study is designed to address some pragmatic issues at this early stage in the use of industrial risk communication:

> -how well are existing programs being carried out in terms of
> the production and distribution of useful materials?

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[27] M. Peltu, "The Role of Communications Media," in *Regulating Industrial Risks*, note 23 *supra*.

[28] *See* M. Hinds, "As Warning Labels Multiply, Messages are Often Ignored," *N.Y. Times* (March 5, 1988) 1; S. Soumerai, et al, "Effect of Government and Commercial Warnings on Reducing Prescription Misuse: The Case of Propoxyphene" (finding of no effect on certain misuses), *Am. Jnl. Public Health*, v. 77, n.12 (Dec. 1987) 1518; and H. Otway, "Risk Communication in the European Communities: Background, Status and Trends," in *Boston Univ. Int'l. L. Jnl.*, note 1 *supra*, who predicts that "as risk communication requirements are implemented, they will increase the public's appetite for information especially in environments where little information has been available . . . Paradoxically, the demand for information and participation in decision processes is always greater if access to them is difficult. [Ultimately] The ready availability of information and the possibility of influencing decisions tend to enhance the credibility of decisionmakers and reduce the demand for participation."

-do the programs reinforce or impair other regulatory functions and legal doctrines for preventing risk?

-are corrective measures needed to improve the design and administration of the programs?

-what general principles should govern the design and administration of future federal programs for industrial risk communication?

To answer these questions, three programs are now examined: OSHA's "Hazard Communication" standard (HCS),[29] the Emergency Planning and Community Right to Know Act (EPCRA) implemented by EPA,[30] and the FDA's "Patient Package Insert" Rule (PPI).[31]

II. OSHA's Hazard Communication Program

A. Introduction

After an extensive rulemaking process, the Occupational Safety & Health Administration (OSHA) promulgated its Hazard Communication Standard (HCS) on November 25, 1983, to take effect by May 25, 1986.[32] OSHA had found that large numbers of workers were being exposed to hazardous chemicals in the workplace, usually without the complete and accurate knowledge of either employees or employers.[33] Based on the concept that workers have both "a need and right to know the hazards and identities of the chemicals they are exposed to when working,"[34] OSHA adopted a broad hazard communication rule that applies to all hazardous substances in the workplace. This generic standard, which differs from OSHA's usual substance by substance approach, has been described by one former high-ranking OSHA official as "the most significant regulatory action ever taken by the agency."[35] The promulgation of the HCS was broadly supported by labor, much of industry, academics and professionals.[36]

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[29] Note 4 *supra*.

[30] Note 5 *supra*.

[31] Note 6 *supra*.

[32] 48 Fed. Reg. 53,280 (1983). The Hazard Communication Standard is found at 29 CFR 1910.1200 (1987).

[33] 48 Fed. Reg. 53,323 (1983).

[34] 53 Fed. Reg. 29,852 (1988). Guidelines for Employer Compliance, Proposed Appendix E to 29 CFR 1910.1200.

The HCS imposes duties on the manufacturers, distributors and importers of hazardous chemicals to furnish their industrial customers with labels and data sheets for the hazardous chemicals they purchase; and requires both manufacturers and industrial customers as employers to then provide this information to all their employees who are exposed to the chemicals together with special education or training programs. Concommitantly, the HCS vests in these employees the "right to know" such information. Thus, the HCS provides for an enforceable program of risk communication designed to protect worker health and safety

B. History and Scope

The 1970 OSHA Act authorized OSHA to issue standards which ensure "that employees are appraised of all hazards to which they are exposed."[37] Efforts to promulgate a generic hazard communication standard began in 1974, but it took almost a decade of preparation and rulemaking for the final rule to be published, during which time there were numerous changes, criticisms and delays.[38] When the final standard was finally published in 1983, it was immediately challenged in court by trade unions, a public interest organization, and several states.[39]

Although several provisions of the HCS were contested in the immediate court challenges, the most important was the scope of the standard. OSHA had applied the HCS only to firms and employees in the manufacturing sector, based on its finding that the greatest risks to employees from exposure to hazardous substances occurred in that sector of industry.[40] On judicial review, petitioners sought expansion of the standard to other industrial sectors. The

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[35] Tyson, *The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws*, 62 *Notre Dame L. Rev*. 1010, 1011 (1987).

[36] *See* 48 Fed. Reg. 53,282-83 (1983).

[37] 29 U.S.C., 655(b)(7) (1970).

[38] *See* 52 Fed. Reg. 31,852-53 (1987) and *United Steelworkers of America v. Auchter*, 763 F.2d 728, 732 (3rd Cir. 1985) for a description of the events leading up to the promulgation of the final standard.

[39] These early challenges were consolidated in the Third Circuit and decided in *United Steelworkers*, 763 F.2d at 728 (1985).

[40] 48 Fed. Reg. 53,284 (1983).

Third Circuit Court of Appeals ruled that the OSHA standard must apply to all sectors of industry unless the agency can show it is not feasible for particular industries to comply with the standard.[41] Because OSHA had not made such a finding for nonmanufacturing industries, the court ordered OSHA to apply the HCS to these other sectors unless it could "state reasons why such application would not be feasible."[42]

Following the court's decision, several industrial sectors sought to convince OSHA that they should be exempted from the HCS. For example, small businesses argued that it would be too burdensome for them to comply with the standard's requirements. OSHA rejected this argument on the grounds that it would not be "appropriate to determine the extent of protection afforded an employee by the size of business he/she is employed in."[43] Other industries complained that the application of the HCS to their sector would be impractical because hundreds or thousands of different chemicals are used.[44] Again, OSHA rejected the relevance of this factor for determining whether or not employees should be warned of exposure to hazardous substances.[45] Finally, certain industrial sectors argued that industries that do not expose workers to significant risks should be exempted from the HCS.[46] OSHA responded that if potentially hazardous substances were present in the workplace, the level of actual risk was not a valid reason for exempting or limiting application of the standard.[47]

While OSHA was in the process of compiling a rulemaking record for extending the scope of the HCS, the Third Circuit determined that a new record was unnecessary and ordered OSHA to publish a final rule within 60 days.[48] In August 1987, OSHA complied with the court's order and revised the standard to apply to all firms that use, sell, store or transport hazardous

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[41] *United Steelworkers v. Auchter*, 763 F.2d at 738 (1985).

[42] *Id.* at 739.

[43] 53 Fed. Reg. 29,822 (1988).

[44] *Id.* at 29,827. A representative of the National Association of Home Builders commented that because of the large number of substances used by the construction industry, "I have this vision of a truck pulling up to the site and behind it is the trailer and on the trailer is the file cabinet of MSD sheets."

[45] *Id.*

[46] *Id.* at 29,826.

[47] *Id.*

[48] *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3rd Cir. 1987). The United Steelworkers had returned to court to argue that a new round of rulemaking was an unnecessary delay in complying with the court's earlier decision ordering OSHA to reconsider the scope of the HCS. The Third Circuit agreed, and on May 29, 1987 ordered OSHA to publish a new final rule based on the existing record within 60 days.

chemicals.[49] The expanded standard now applies to approximately 4.5 million workplaces and 58.9 million potentially exposed employees.[50] Although the expanded HCS went into effect on May 23, 1988, the scope of the standard continued to be the subject of major controversies,[51] until February 1989 when the agency announced that "all provisions of the rule are now in effect in all segments of industry."[52]

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[49] 52 Fed. Reg. 31,852 (1987).

[50] *Occupational Safety & Health Reporter*, (BNA), May 5, 1988 at 1851.

[51] The Associated Builders and Contractors inc. challenged the application of the HCS to the construction industry in the D.C. Circuit Court of Appeals. On May 20, 1988, three days before the expanded HCS was to go into effect, the D.C. Circuit issued a temporary stay of the standard's application to the construction industry, and transferred the challenge to the Third Circuit for final ruling. Occupational Safety & Health Reporter (BNA), May 25, 1988 at 1867. On November 25, 1988, the Third Circuit rejected the procedural and substantive challenges to the expanded HCS by the construction industry and other industrial petitioners. Associated Builders and Contractors, Inc. v. Brock, 862 F.2d 63 (3rd Cir. 1988). Further requests for a stay were denied by both the Third Circuit and U.S. Supreme Court Justice William Brennan (Nos. 88-1070, 88-1075). See 54 Fed. Reg. 6886, 7 for the historical record of the litigation. Another ongoing controversy has involved the OMB's criticisms of the expanded rule. OSHA slightly modified the HCS when it expanded it to other industrial sectors, by including a new provision requiring employers at multiemployer worksites to exchange hazard information, 29 CFR 1910.1200(e)(2), and providing partial exemptions for many consumer products, 29 CFR 1910.1200 (b)(6)(vii) and drugs, 29 CFR 1910.1200(b)(6)(viii). OMB disapproved the three new provisions, Office of Management and Budget Letter Extending Approval for Hazardous Communication Provisions, April 13, 1988, reprinted in *Occupational Safety & Health Reporter* (BNA), April 20, 1988 at 1715. On August 8, 1988, OSHA published a Notice of Proposed Rulemaking to consider OMB's criticisms and other comments it had received on the expanded scope of the HCS, 53 Fed. Reg. 29.822 (1988). Less than two weeks later, the Third Circuit Court of Appeals ruled that OMB was not authorized to disapprove the new provisions of the HCS because they did not involve "collection of information" and embodied policy making discretion entrusted to OSHA. *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3rd Cir. 1988). United Technologies Corp. and the Department of Justice petitioned the Third Circuit on September 2, 1988 to rehear the case *en banc, Occupational Safety & Health Reporter*, September 9, 1988 at 788. The court denied this petition on November 2, 1988, as well as requests for a stay of the decision. A further motion by industry for a stay was denied by U.S. Supreme Court Justice William Brennan on January 24, 1989. For these and other maneuvers, see 54 Fed. Reg. 6886 (1989).

[52] 54 Fed. Reg. 6886 (Feb. 15, 1989).

C. Applicability

A critical aspect of the HCS is the process by which chemicals are to be evaluated and found to be hazardous. OSHA has adopted a hybrid procedure incorporating two different approaches for determining which chemicals are "hazards" and therefore covered by the HCS. First, the standard specifies that all chemicals on two designated lists of hazardous chemicals and four official lists of carcinogens are automatically to be considered "hazardous" under the HCS.[53] These lists provide a "floor" of approximately 2400 hazardous chemicals to which the HCS applies, but represent only a small percentage of the total number of hazardous chemicals in the workplace.[54]

The second hazard determination approach adopted by the standard is for manufacturers and importers of a chemical not on the designated lists to evaluate whether the chemical is hazardous using "available scientific evidence."[55] The standard provides guidance for companies making hazard determinations in two appendices which describe the types of hazards covered[56] and the criteria to be applied.[57] For example, the standard specifies that one statistically significant study "conducted in accordance with established scientific principles" is sufficient to establish that a substance is hazardous.[58] However, the standard does not prescribe specific procedures for hazard determination, because "a completely specified weighting procedure for the hazard evaluation would suggest certainty where certainty does not exist."[59] Instead, chemical suppliers are told to make hazard determinations based on their "professional judgment."[60]

Exemptions or limitations of the standard's requirements are provided for laboratories, pesticides, food and drugs, many consumer products, and

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[53] 29 CFR 1910.1200(d)(1987).

[54] Waldo and Hinds, *Chemical Hazard Communication Guidebook,* Executive Enterprises Publications Co., Inc., (1988) at 13. OSHA's decision not to rely on a much larger list of potentially hazardous substances compiled by NIOSH because the list is likely to be overinclusive was upheld by the court in *United Steelworkers v. Auchter,* 763 F.2d at 739 (1985).

[55] 29 CFR 1910.1200 (d) (1987). Note that because a chemical supplier need only evaluate "available" scientific evidence, there is no affirmative duty on a manufacturer or importer to research the possible adverse health effects of a substance.

[56] 29 CFR 1910.1200 Appendix A (1987).

[57] 29 CFR 1910.1200 Appendix B (1987).

[58] 29 CFR 1910.1200(d)(2) (1987).

[59] 48 Fed. Reg. 53.326 (1983).

[60] *Id.* at 53,296. Since the HCS applies only to hazardous substances known to be in the workplace, chemical reaction intermediates and other undetected substances are exempt. The standard also imposes no affirmative duty on employers to discover unknown hazardous substances which are preessent in the workplace. 29 CFR 1910.1200(b)(2) (1987).

"articles."[61] Mixtures are also exempted if they contain hazardous substances in very low concentrations, which is defined as one percent of the mixture by weight or volume for health hazards in general and 0.1 percent for carcinogens.[62]

Except for such mixtures with small concentrations of hazardous substances, the HCS does not provide for exemption of de minimis risks. Although the Supreme Court has held that an OSHA standard must be supported by a finding of "significant risk,"[63] OSHA made a significant risk finding for the HCS as a program rather than for particular chemicals, worksites or industrial sectors.[64] This generic finding was recently affirmed by the Third Circuit which held that for a "standard covering thousands of chemical substances used in numerous industries . . . the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries."[65]

Following its programmatic finding of significant risk, OSHA determined that it was not "appropriate to include concepts of degree of exposure or risk into the definition for health hazard."[66] OSHA's rationale was that since the HCS puts the burden of identifying and labelling hazards on upstream suppliers,[67] there is no way they can know with certainty whether exposure in downstream workplaces will result in significant risks.[68] OSHA's determination to not provide an exemption for insignificant risks was upheld by the D.C. Circuit Court of Appeals in General Carbon Co. v. OSHA.[69] The court agreed with OSHA that the requirements imposed by the HCS were "in no way contingent on anticipated conditions at a particular downstream site."[70] However, while the court upheld OSHA's interpretation of the HCS as not providing an exemption for insignificant risks, the court twice emphasized that the validity of the standard for not allowing such an exemption might "more plausibly" be challenged.[71] Such a challenge is likely in a future HCS enforcement action, given the court's prompting.

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[61] 29 CFR 1910.1200(b)(3) & (4) (1987).

[62] 29 CFR 1910.1200(d)(5) (1987).

[63] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 639 (1980).

[64] 48 Fed. Reg. 53,321 (1983).

[65] *Associated Builders and Contractors v. Brock*, 1988 WL 124304 (3rd Cir. 1988).

[66] 48 Fed. Reg. 53,295 (1983).

[67] *See infra* note 74.

[68] 48 Fed. Reg. 53,295 (1983).

[69] 1988 WL 117401 (D.C. Cir.). The court's decision was announced November 8, 1988.

[70] *Id.*

[71] *Id.*

D. Requirements

The HCS has three major inter-related risk communication components. First, chemical producers and importers must label all containers of hazardous chemicals they sell with the identity of the hazardous substance, "appropriate" hazard warnings, and the name and address of the supplier.[72] All employers, whether producers or their downstream customers, thereafter have responsibility for ensuring that all containers of hazardous substances in their workplace are properly labelled.[73]

Second, chemical producers and importers must prepare or obtain a material safety data sheet (MSDS) for each hazardous substance they produce or import.[74] Along with other information, the MSDS must designate the substance's identity, physical and chemical properties, health hazards, appropriate safety guidelines and first aid procedures.[75] All firms using or storing the hazardous substances must be provided with a copy of the MSDS for each substance by the producer or importer.[76] Thereafter, the producers and downstream firms which have received the MSDS's must make these documents readily accessible to their employees at the worksite during each work shift.[77] The third major component of the HCS is that these employers must inform and train their employees about the hazards present in the workplace, hazard detection and protection methods, the requirements of the HCS, and the details of the facility's hazard communication program, including the location of MSDS's.[78] Employers must also maintain a written hazard communication program that describes the hazards present in the workplace and the steps taken to comply with the HCS.[79]

According to OSHA, none of the three major components alone "can be demonstrated to be completely effective in communicating hazards."[80] However, labels, MSDSs and employee training taken together complement and reinforce each other and provide an integrated communication program. For example, labels provide an immediate and obvious warning of the most serious health effects, while the MSDS makes available more detailed information. Requiring all information to be put on the label would likely cause information overload and would be much more expensive.[81] Since labels and MSDSs may be ignored by some employees, mandatory worker training is needed to assure that workers are informed and address risk implications.

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[72] 29 CFR 1910.1200(f)(1) (1987).

[73] 29 CFR 1910.1200(f)(4) (1987).

[74] 29 CFR 1910.1200(g)(1) (1987).

[75] 29 CFR 1910.1200(g)(2) (1987).

[76] 29 CFR 1910.1200(g)(6) (1987).

[77] 29 CFR 1910.1200(g)(9) (1987).

[78] 29 CFR 1910.1200(h)(1987).

[79] 29 CFR 1910.1200(e) (1987).

[80] 48 Fed. Reg. 53,311 (1983).

E. Regulatory Approach

The HCS is distinctly and purposively "performance oriented," in that it does not require employers to follow specific procedures, but sets goals for employers to meet, and provides for monitoring of their performance.[82] As discussed earlier, OSHA rejected a "cookbook" approach of specific procedures for hazard determination, and instead directed chemical producers to use "a large degree of professional judgement" when determining whether substances are hazardous.[83] Labels do not have to follow a standardized format,[84] and are only required to provide an "appropriate" hazard warning.[85] Similarly, material safety data sheets may be "in any form" as long as they provide adequate information.[86] Finally, "[t]he format of the education and training program was left to the discretion of the employer."[87]

The main advantage OSHA cited for using this performance-oriented approach is that it provides flexibility in adapting the HCS to a great diversity of employers and worksites.[88] A secondary reason for the performance-oriented standard is to permit employers "who have voluntarily instituted effective programs of hazard communication for their employees [to] continue to use them without substantial modification."[89]

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[81] *Id.* at 53,326.

[82] In a proposed new appendix to the standard to assist employer compliance, OSHA explains: "One difference between this rule and many others adopted by OSHA is that this one is performance-oriented. That means that you have the flexibility to adapt the rule to the needs of your workplace, rather than having to follow specific, rigid requirements. It also means that you have to exercise more judgement to implement an appropriate and effective program." Guidelines for Employer Compliance, Proposed Appendix E to 29 CFR 1910.1200, 53 Fed. Reg. 29,853 (1988). *See generally* O'Reilly, *The Impact of Performance-Oriented Rules on Administrative Enforcement: The Case of OSHA Hazard Communication Rules*, 2 *Lab. Law.* 695 (1986).

[83] 48 Fed. Reg. 53,296 (1983).

[84] 48 Fed. Reg. 53,301 (1983).

[85] 29 CFR 1910.1200(f)(1)(ii) (1987).

[86] 29 CFR 1910.1200(g)(9) (1987).

[87] 48 Fed. Reg. 53,327 (1983).

[88] 48 Fed. Reg. 53,326 (1983).

However, there are several disadvantages to this performance-oriented approach. The lack of clearly specified hazard determination procedures and communication formats inevitably leads to inconsistency, and discrepancies between firms leads to unequal protection for workers.[90] A related problem is that, without clearly specified requirements, many companies attempting to comply with the standard will be confused or tempted to postpone compliance indefinitely.[91] A performance-oriented standard may also be more difficult for OSHA to enforce because of these same ambiguities.[92]

Finally, performance-oriented regulations have often failed because of the different values of government regulators and industry managers.[93] Performance-oriented standards require value judgments as well as technical determinations, and it is obvious that corporate values usually differ from the broader goals and values which are held by regulatory officials. Accordingly, the interpretation and application of the HCS that seems most reasonable to an employer is likely to deviate from the views of the regulators.

F. Relation to State Hazard Communication Laws

By the time OSHA published its hazard communication standard in 1983, many states and municipalities had already enacted their own worker right-to-know laws.[94] Multi-state employers facing the increased cost of complying with many different state and local right-to-know laws[95] lent their support or acquiescence to OSHA's proposal for a national standard "to establish uniform requirements for hazard communication."[96]

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[89] *Id.* at 53,282. For a discussion of the relative advantages and disadvantages of performance-based standards and the more common "command" approach for OSHA regulation, see McGarity & Shapiro, "OSHA Regulations, Regulatory Alternatives and Legislative Reform," Administrative Conference of the United States Report for Recommendation 87-10, 1987 ACUS 999 (1987). Some other advantages of the performance approach is that it allows experimentation and evaluation of alternative implementation techniques, it is less intrusive, and it lets the party with the most information (i.e., the firm) choose the most cost-effective means of compliance. *Id.* at 1010, 1022. The authors recommend that OSHA use performance standards whenever they offer the same degree of protection as alternative approaches, can be easily understood and enforced, and will result in cheaper compliance costs. *Id.* at 1022.

[90] *See, e.g.,, Occupational Safety & Health Reporter (BNA),* April 24, 1986 at 1166. (different manufacturers often provide conflicting hazard information on a particular chemical). Also see Occupational Safety & Health Reporter (BNA), Nov. 30, 1988 at 1201 (MSDS's found to be variable, often incomplete, and inadequate on chronic toxicity information).

[91] *Occupational Safety & Health Reporter (BNA)*, June 12, 1986 at 27.

[92] *See infra* note 170.

[93] *See* Henderson & Pearson, "Implementing Federal Environmental Policies: The Limits of Aspirational Commands," 78 *Colum. L. Rev.* 1429 (1978).

Although trade unions argued that the federal HCS should act as a "safety floor" which would permit states to enact stricter laws,[97] OSHA sought to establish that its standard would preempt state and local laws.[98] The OSH Act provides that nothing "shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect.[99] However, the HCS is "intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees . . . and to preempt any state law pertaining to this subject."[100]

In addressing this conflict, several courts held that OSHA's original HCS expressly preempted state laws with respect to hazard communication to employees in the manufacturing sector.[101] Now that the HCS has been extended to nonmanufacturing sectors,[102] state right to know laws will also be preempted for these other sectors as well. Although the HCS only expressly preempted state and not local laws, one court has held that the HCS also preempts local right to know laws pertaining to occupational safety and health.[103]

A remaining problem with respect to the preemptive effect of the HCS is state or local right to know laws that apply to both occupational and environmental (or community) hazards. The HCS expressly preempts only those parts of state laws that pertain to protection of employee health and safety.[104] However, the intent of a federal regulation to preempt state right to know laws will be implied if it is impossible to comply with both the federal and state standards, or the state standard stands as an "obstacle" to the effective implementation of the federal rule.[105] In determining whether the HCS preempts state laws that require companies to disclose hazard information to both workers and the community, courts have evaluated the state laws section by section for implied preemption.[106] Thus far, the courts have upheld sections of state laws with purposes other than protecting occupational health (e.g., communication of risk information to the community or its police and fire personnel), even though the laws thereby impose dual labelling requirements and other additional hazard communication duties on employers already subject to the HCS requirements.[107]

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[94] 48 Fed. Reg. 53,324 (1983). Many of the state right-to-know laws differed from the HCS with respect to hazard determination, trade secret protection, regulatory approach, and the right of workers to refuse work when the law is not being followed. *See* Baram, "The Right to Know and the Duty to Disclose Hazard Information," 74 AM. J. PUBLIC HEALTH 385, 389 (1984); Feitshans, "Hazardous Substances in the Workplace: How Much Does the Employee Have the "Right To Know?," 1985 *Det. C.L. Rev.* 697, 702-15 (1985); Tyson, *supra* note 35 at 1016.

[95] No footnote.

[96] 48 Fed. Reg. 53,281 (1983).

[97] *See*, "The New Meaning of Right to Know," *Chemical Week*, June 19, 1985 at 24.

[98] 48 Fed. Reg. 53,322-23 (1983).

[99] 29 U.S.C. 667(a) (1982).

[100] 29 CFR 1910.1200(a)(2) (1987).

[101] No footnote.

[102] Note 49, *supra*.

[103] *Ohio Manufacturers' Association v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), cert. denied 108 S.Ct. 44 (1987). OSHA has subsequently revised 29 CFR 1910.1200(a)(2) to specifically provide that both state and local right to know laws pertaining to occupational safety and health are preempted by the HCS. 52 Fed. Reg. 31,860 (1987).

The OSHA Act also permits states to submit a state plan to OSHA to assume responsibility for regulating an occupational safety and health issue for which OSHA has issued a standard.[108] OSHA shall approve a proposed state plan only if it will be "at least as effective" as the federal standard, and when applicable to products in interstate commerce, is "required by compelling local conditions" and does not "unduly burden interstate commerce."[109] OSHA intends to "scrutinize carefully" any state plan containing hazard communication requirements because of the "strong policy justification for uniform application throughout the distribution system of a national hazard communication standard."[110]

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[104] *N.J. State Chamber of Commerce v. Hughey*, 774 F.2d at 587 (1985).

[105] *N.J. State Chamber of Commerce*, 774 F.2d at 592 (1985), citing *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 248 (1984).

[106] *N.J. State Chamber of Commerce*, 774 F.2d at 587 (1985); *Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130 (3rd Cir. 1986), *cert. denied* 108 S.Ct. 66 (1987).

[107] *Mfrs. Ass'n of Tri County*, 801 F.2d 130; *Occupational Safety & Health Reporter (BNA)*, February 2, 1988 at 1435. *Also see N.J. Chamber of Commerce v. Hughey*, 13 OSHC 2040 (3rd Cir., Feb. 28, 1989), upholding the "universal labelling requirements" of the New Jersey Right to Know Act, despite resulting duplicative requirements for firms. Nevertheless, two chemical industry groups have now petitioned a federal district court to determine if the HCS preempts the warning regulations enacted under California's Proposition 65. *Chemical Manufacturer's Association v. California Health and Welfare Agency*, D.C. E. Calif., No. CIV-S-88-1615-Lkk-JFM. December 16, 1988. *See Chemical Regulation Reporter* (BNA), Dec. 23, 1988 at 1453.

[108] 29 U.S.C. 667(b) (1982). The state plan provision is incorporated in the HCS at 29 CFR 1910.1200(a)(2) (1987).

[109] 29 U.S.C. 667(c) (1982).

[110] 48 Fed. Reg. 53,322-23 (1983).

G. Trade Secret Protection

The HCS permits an employer or chemical supplier to withhold the specific chemical identity of a substance if it is a bona fide trade secret.[111] In many instances, a company's most important confidential business information will already be protected, because the HCS does not require disclosure of a substance's proportional composition or production steps. "A recipe is less valuable when it only gives names of ingredients."[112] Although the identity of a chemical may be kept confidential, all other information on the MSDS must be disclosed to the worker, including all hazard information.[113] Therefore, the standard's objective of communicating hazard information to employees is substantially achieved even if the chemical's name is not identified.

The trade secret provision of the HCS was successfully challenged in court in two respects, shortly after the original standard was promulgated in 1983.[114] First, the court held that the definition of trade secret in the HCS was too broad, and that OSHA was not authorized by the OSH Act to provide trade secret protection greater than that afforded by state law.[115] The scope of trade secret protection under state law is usually defined by section 757 of the Restatement of Torts,[116] which sets forth six factors that must be weighed in determining whether particular information would be classified as a trade secret.[117] The court ruled that the trade secret definition in the original HCS "enlarges considerably" the Restatement definition because it provides protection for a chemical identity that can be discovered by reverse engineering.[118] The court therefore remanded the HCS trade secret definition to OSHA to develop a new definition that "shall not include chemical identity information that is readily discoverable through reverse engineering."[119]

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[111] 29 CFR 1910.1200(i)(1) (1987)

[112] O'Reilly, *supra* note 82 at 704

[113] 29 CFR 1910.1200(i)(1)(ii) (1987)

[114] *United Steelworkers v. Auchter*, 763 F.2d at 728 (1985).

[115] *Id.* at 739

[116] *Restatement of Torts*, section 757, comment (b) (1939)

[117] The six factors are: (1) The extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort and money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Quoted from 51 Fed. Reg. 34,592 (1986).

[118] *United Steelworkers v. Auchter*, 763 F.2d at 740 (1985). "Reverse engineering" consists of using analytical chemistry techniques on a chemical sample to discover the substance's identity.

The court's decision has been criticized as contradictory. On one hand, the court required the standard's trade secret provisions to be consistent with the six factor balancing test of state law, while on the other hand the court elevated one of the six factors into a legally determinative test of "readily discoverable."[120] OSHA subsequently amended the HCS by incorporating the Restatement trade secret definition as an appendix to the standard.[121] However, OSHA determined that it was "unnecessary" to include any specific reference to reverse engineering capability in the revised standard despite the court's emphasis on this factor.[122] It is not clear whether a chemical identity that otherwise passes the six factor Restatement balancing test but may be reverse engineerable would be protected as a trade secret by the courts or OSHA.

The Third Circuit also decided that the access to trade secret information provided by the standard was overly restrictive.[123] The HCS originally required trade secret chemical identity information to be disclosed on certain conditions to health professionals but not employees.[124] The court determined that the restriction on employee access was not supported by substantial evidence, since OSHA had not shown that employees are any more likely than health professionals to breach a confidentiality agreement.[125] OSHA complied with the court's decision by extending access to trade secrets to employees and their designated representatives.[126]

Except during emergencies, employers are required to disclose trade secrets to health professionals, employees or designated representatives only under certain conditions. The requester must state in writing with "reasonable detail" why access to the information is necessary for one of seven approved reasons.[127] The requester must also explain in detail why other information not protected as a trade secret, such as hazard data, is not sufficient to satisfy the purpose for which the chemical identity is requested.[128] Finally, the requester must be willing to sign a confidentiality agreement that may specify a reasonable liquidated damages remedy in the event of a breach.[129] These conditions for trade secret access were upheld as reasonable by the court.[130]

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[119] *Id.* at 741-42. The court did not define what is meant by "readily discoverable." It will be difficult for an OSHA inspector, who will often lack technical expertise, to determine whether a particular chemical's identity is "readily discoverable." Furthermore, economic constraints and not technical feasibility often determines whether reverse engineering is feasible. O'Reilly, *supra* note 82 at 711.

[120] Id. at 707, n.105

[121] 51 Fed. Reg. 34,592 (1986). The Restatement's trade secret definition is reprinted as Appendix D to 29 CFR 1910.1200 (1987)

[122] 51 Fed. Reg. 34,592 (1986).

[123] No footnote.

[124] 48 Fed. Reg. 53,318 (1986).

[125] *United Steelworkers v. Auchter*, 763 F.2d at 743 (1985).

[126] 51 Fed. Reg. 34,595 (1986). The trade secret access provisions are found at 29 CFR 1910.1200(i)(3) (1987).

H. Implications for Common Law Tort Remedies

One of the original rationales for the HCS was to improve the usefulness of the tort system to force chemical manufacturers to give greater consideration to product safety and means of reducing harms to product users, in particular, the employees of their downstream customers.[131] Fear of tort liability had traditionally deterred the manufacturers from disclosing product risk information, since without the information, injured employees downstream would be less likely to litigate claims against them, and less likely to succeed if they did litigate.[132]

These downstream employees are generally barred from suing their employers because of the "exclusivity of remedy" provision of state workers' compensation laws, and can only sue third parties in tort, such as the manufacturer or supplier of the chemical. The HCS now aids them in these tort actions. First, the standard is "action forcing," in that it requires manufacturers to create records that may be used to establish liability.[133] Second, the required disclosure of this information to employees should ease considerably their burden as potential plaintiffs of getting information through costly and time-consuming discovery procedures.[134] Finally, the manufacturer's failure to fully comply with the requirements of the HCS might be negligence per se or at least evidence of lack of due care.[135]

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[127] 29 CFR 1910.1200(i)(3) (1987).

[128] 29 CFR 1910.1200(i)(3)(iii) (1987).

[129] 29 CFR 1910.1200(i)(3)(iv) & (i)(4)(ii) (1987).

[130] *United Steelworkers v. Auchter*, 763 F.2d at 742-43 (1985).

[131] No footnote.

[132] *Id.*

[133] O'Reilly, *Driving a Soft Bargain: Unions, Toxic Materials, and Right To Know Legislation, 9 Harv. Envtl. L. Rev.* 307, 318 (1985).

[134] *Id.*

[135] For a violation of a statute or regulation to be negligence *per se*, a plaintiff must demonstrate the "violation of a statute which is intended to protect the class of persons to which

Nonetheless, the HCS may prove to be more useful to chemical suppliers in defending against these tort suits. Defendants can be expected to use their regulatory compliance with the HCS as evidence of providing sufficient warnings and exercising due care, although courts have found regulatory compliance to be an insufficient defense in the past.[136] Chemical producers may also assert a more compelling version of the defense of assumption of risk, arguing that a worker's voluntary decision to accept exposure to a fully disclosed risk absolves the manufacturer of liability. Although assumption of risk defenses have also proved to be not particularly useful, courts may now be more receptive to the defense, given the defendant's compliance with the comprehensive hazard disclosure requirements of the HCS.[137] Widespread acceptance of the assumption of risk defense could make "tort law recovery relatively obsolete in future industrial toxic illness cases."[138]

The performance-oriented approach of the HCS will have important implications for tort litigation. Since a failure to comply with the HCS would be introduced by injured plaintiffs as evidence of the manufacturer's failure to use due care, manufacturers will be very careful to comply with the standard's requirements. Under the HCS, a performance standard, criteria for determining the adequacy of a hazard communication program are not clearly specified. Courts, like OSHA, will probably compare a company's performance to that of the rest of the industry when determining compliance. Therefore, a company that under-estimates or under-states the risks of a particular substance relative to other producers of the same chemical may be legally vulnerable. Since no firm will want to appear less protective than its competitors, companies may thereby be induced to adopt the "highest common denominator" of protection.[139]

In other words, the threat of tort liability is likely to serve as a continuing force which enhances manufacturer compliance with the performance-based HCS. Nevertheless, trade unions fear that leaving hazard determination to the judgment of chemical manufacturers might tempt them to downplay chronic

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the plaintiff belongs against the risk of the type of harm which has in fact occurred." *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d, 706,709 (5th Cir. 1981).

[136] *See* O'Reilly, *Risks of Assumptions: Impacts of Regulatory Label Warnings Upon Industrial Products Liability*, 37 *Cath. U.L. Rev.* 85, 92 (1987). *Also see* M. Baram, "On Advantages of Living in the New Fishbowl," *National Underwriter* 23 (March 21, 1988).

[137] *Id.* Although not involving the HCS, a recent case in the Fifth Circuit accepted the assumption of risk defense when the injured worker was aware of the hazard, and may signal a new receptivity to this defense. *Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409 (5th Cir. 1987)

[138] O'Reilly, *supra* note 136 at 87.

[139] O'Reilly, *supra* note 82 at 709

health risks in order to reduce liability exposure.[140] Finally, given the "exclusivity of remedy" rule of state workers' compensation law, a no-fault system for workers to secure "benefits" only from their employers, the HCS is unlikely to affect employer immunity from the tort system.

I. Relationship to Regulations of Other Agencies

OSHA's HCS interacts with regulations of other agencies in at least two ways. First, pesticides, food and drugs, and consumer products are subject to the labelling requirements of other agencies, and have been exempted by OSHA from labelling requirements under the HCS.[141] However, labelling regulations issued by other agencies for these products usually do not address their workplace use and the risks they pose at the high levels of occupational exposure often encountered. Therefore, OSHA is still in the process of determining how and when it will defer to, or cooperate with, other agencies with authority to require hazard disclosures for these products when they are used in the workplace.[142]

The second type of interaction with regulations of other agencies is the incorporation of certain definitions and provisions of the HCS into the new community right to know law (EPCRA) administered by EPA, which is discussed in the next section in this report. For example, EPCRA requires any employer who must prepare or have available MSDS's under the HCS to submit copies to state and local officials.[143] Therefore, when OSHA decided to expand the HCS to include nonmanufacturing sectors, it also substantially expanded the scope of the community right to know law,[144] but also caused delays in its regulatory compliance schedule.[145] Similarly, since EPA has incorporated the HCS definition of "article,"[146] OSHA's current proposal[147] to modify its definition will also affect EPA's community right to know requirements. Thus, linkage between the HCS and EPCRA is a source of disruption of the latter program.

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[140] "Chemical Companies Face Up to Hazard Communication," *Chemical Week*, November 20, 1985 at 56, 58.

[141] 29 CFR 1910.1200(a)(4) (1987).

[142] *See, e.g.,*, 53 Fed. Reg. 29,833-36 (1988); *Occupational Safety & Health Reporter (BNA)*, November 16, 1988 at 1146; December 14, 1988 at 1374; and December 21, 1988 at 1397 for controversies now arising.

[143] 42 U.S.C. 11021.

[144] 52 Fed. Reg. 31,859 (1987).

[145] *See* Waldo and Hinds, *Chemical Hazard Communication Guidebook* at 43.

[146] *See* 53 Fed. Reg. 29,830 (1988).

[147] 53 Fed. Reg. 29,828-33 (1988).

J. Relation to Other OSHA Standards

The HCS provides that labels and other forms of warning used in a hazard communication program satisfying the requirements of the HCS must also meet the requirements of any applicable substance-specific OSHA standards.[148] OSHA's compliance directive for hazard communication programs further states that the HCS "was designed to prevent duplication with other OSHA standards" and that in some cases duties under other standards can be "interfaced with the requirements of the HCS to result in simplified compliance."[149] For example, according to OSHA, some of the requirements of the HCS and the Access to Employee Exposure and Medical Records standard[150] could be merged.[151]

The HCS compliance directive also provides that "the HCS defers labelling requirements to [a] specific standard when one exists."[152] Nevertheless, the OMB refused to approve all hazard communication provisions in a proposed OSHA standard for formaldehyde that exceeded the requirements of the HCS.[153] The hazard communication provisions of the formaldehyde standard were finally approved by OMB after OSHA assured OMB that the standard would impose no further hazard communication requirements beyond those of the HCS.[154] Therefore, it seems that the HCS may act as a ceiling rather than a floor for hazard communication provisions required by OSHA, a development likely to generate new controversies.

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[148] 29 CFR 1910.1200(f)(3) (1987).

[149] OSHA Instruction CPL 2-2.38B(M) (August 15, 1988).

[150] 29 CFR 1910.1200 (1987).

[151] OSHA Instruction CPL 2-2.38B(M)(1) (August 15, 1988).

[152] *Id.* at (M)(2).

[153] *Occupational Safety & Health Reporter (BNA)*, February 3, 1988 at 1374.154.

[154] *Occupational Safety & Health Reporter (BNA)*, October 19, 1988 at 1039. Following this, OSHA announced its decision to stay the hazard communication provisions of the formaldehyde standard and to incorporate the HCS requirements instead. 53 Fed. Reg. 50198 (Dec. 13, 1988).

K. Enforcement

The OSHA Act does not provide for a private right of action to enforce standards.[155] Furthermore, unlike most state right to know laws, the HCS does not expressly grant employees the right to refuse work if the employer has not complied with hazard communication requirements.[156] Enforcement of the HCS therefore primarily depends on inspections of workplaces by OSHA inspectors on their own initiative[157] or at the request of employees who believe that a violation exists that threatens physical harm.[158] If OSHA detects a violation, it is authorized to issue a citation to the noncomplying employer.[159]

Despite limited resources, OSHA has been aggressive in enforcing the HCS in its early stages of implementation. By April 1988, OSHA had issued over 32,000 citations, and subsequently reported 18,163 violations in fiscal year 1988 alone.[160] While the vigor of OSHA's enforcement efforts is encouraging, the pervasiveness of violations suggests that employers are either uninformed or having problems implementing the HCS, or unwilling to comply. The vast majority of citations issued by OSHA are for a complete absence of one or more of the key hazard communication components required by the standard.[161] In FY 1987, the first full year of enforcement of the standard, 43% of inspections in the manufacturing sector detected violations of the HCS.[162] A recent study that sampled MSDSs prepared by chemical manufacturers found most to be incomplete or inadequate, particularly with respect to chronic toxicity information.[163]

Poor compliance with the HCS may be attributable in part to its performance-based orientation, which requires subjective evaluation of the standard's requirements by firms. Widespread confusion and many questions of interpretation about complying with the HCS have been reported in the manufacturing sector.[164] Even greater problems are expected for small businesses, whose compliance OSHA has not even begun to enforce yet.[165] OSHA attempts to provide compliance assistance to firms have generally lagged.[166]

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[155] *Rabon v. Automatic Fasteners, Inc.* 672 F.2d 1231 (5th Cir. 1982); *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981).

[156] *See* Feitshans, *supra* note 94 at 703.

[157] *See* Feitshans, *supra* note 94 at 703.

[158] 29 U.S.C. 657(f) (1982).

[159] 29 U.S.C. 658(a) (1982).

[160] *Occupational Safety & Health Reporter (BNA)*, April 13, 1988 at 1662, and February 17, 1989 at 1675, respectively.

[161] *Id.* Approximately 75% of the citations in 1988 were for absence of a written hazard communication program, employee training program, material safety data sheets or container labels.

[162] *Id.*

[163] *BNA Occupational Safety & Health Daily*, Dec. 1, 1988. The study, conducted by a lecturer at the Harvard School of Public Health, analyzed about 200 MSDSs.

OSHA's enforcement efforts for the HCS are likely to be controversial for two different reasons. OSHA's enforcement system has traditionally been oriented "to a distinct command and control performance, which reduced subjectivity and eschewed the 'performance' approach to regulation."[167] There is evidence that OSHA's enforcement of the HCS is following a similar pattern,[168] even though the standard takes a strong performance-oriented approach. OSHA has issued instructions to its compliance officers that are very specific and seemingly at odds with the performance-oriented "spirit" of the standard.[169] The apparent inconsistency between the regulatory and enforcement approaches of the HCS is likely to cause future legal and compliance problems.

The second source of controversy with OSHA's enforcement efforts will be that accused violators will be more likely to challenge their citations. Since the standard is written in performance-oriented language that requires subjective evaluations, differences in interpretation will likely result in "[g]reater numbers of contests, more hearings, more technical disputes, more discovery problems and more interlocutory appeals."[170] A company's incentive to contest a citation is enhanced by its increased exposure to tort liability that might result from a finding that the company has an inadequate hazard communication program.[171]

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[164] *See, e.g., Occupational Safety & Health Reporter (BNA)*, June 12, 1988 at 27; *Occupational Safety & Health Reporter* (BNA), September 24, 1986 at 420 (One OSHA official told industry representatives that "[i]f you're having trouble interpreting [the HCS], then we must be having trouble enforcing it, and we are.").

[165] *See, e.g.*, Jacobs, "Small Business Slowly Wakes to OSHA Hazard Rule," *Wall St. J.*, November 22, 1988 at p. B22. Mounting pressure is being exerted on OSHA to give greater assistance to small businesses attempting to implement the HCS. *See, e.g., Occupational Safety & Health Reporter* (BNA), November 9, 1988 at 1124.

[166] *Occupational Safety & Health Reporter* (BNA) May 25, 1988 at 1868. OSHA has, however, recently proposed an advisory appendix to the HCS to assist employers with compliance. Guidelines for Employer compliance, Proposed Appendix E to 29 CFR 1910.1200, proposed at 53 Fed. Reg. 29,852 (1988)

[167] O'Reilly, *supra* note 82 at 702.

[168] Goldsmith "OSHA's Hazard Communication Standard: The Early Returns," 12 Employee Relations L.J. 313, 316 (1986).

[169] Id. The most recent enforcement instructions are in OSHA Instruction CPL 2-2.38B, August 15, 1988.

[170] O'Reilly, *supra* note 82 at 730. An employer can contest a citation at a hearing of the Occupational Safety and Health Review Commission. 29 U.S.C. 659(c) (1982). The

L. Effectiveness of Standard for Reducing Workplace Illness

When OSHA promulgated the HCS, it proclaimed that "[t]he result of this hazard communication program will be to reduce the incidence of chemical source illnesses and injuries."[172] OSHA further asserted that the HCS will prevent about 20% of chemically caused injuries and illnesses in the workplace.[173] The agency has also estimated that extension of the HCS to the nonmanufacturing sector is expected to prevent 74,200 cancer deaths and an equal number of nonfatal cancers, 119,200 chronic disabling illnesses, and more than one million other workplace injuries and illnesses over the next forty years.[174] These benefits are expected to result from "increased worker use of personal protective devices, improved work practices, and other precautionary measures when handling hazardous substances" as well as more safety-enhancing investments by employers.[175]

However, several factors might limit the effectiveness of the HCS. First, workers may not get the hazard information they need to reduce exposure. The hazard information in MSDSs is frequently inadequate and incomplete.[176] Even if the information is contained in the MSDS, workers may refrain from requesting access to the forms out of fear of retaliation by the employer.[177] The required worker training programs, for which the standard does not present any specific guidelines, are frequently brief, ineffective sessions

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commission's order can then be appealed to a federal court of appeals. 29 U.S.C. 660 (1982). The first of what promises to be a steady stream of HCS interpretive problems that will end up in the courts was decided in late November, 1988, *General Carbon Co. v. OSHA*, 1988 WL 117401 (D.C. Cir. 1988) (rejecting company's challenge of OSHA's interpretation of HCS to not provide an exception for insignificant risks).

[171] *See Occupational Safety and Health Reporter* (BNA), June 6, 1985 at 4.

[172] 48 Fed. Reg. 53,281 (1983).

[173] 52 Fed. Reg. 31,861 (1987).

[174] *Id.* at 31,869.

[175] 48 Fed. Reg. 53,328 (1983).

[176] *Supra* notes 90 and 163. This problem also bears on the ability of the worker's personal physician to diagnose problems. See Himmelstein, "The Right to Know About Toxic Exposures," *N.E. Jnl. of Medicine*, v. 312, n.11 at 687.

[177] *Occupational Safety & Health Reporter* (BNA), May 16, 1985 at 994.

featuring standardized video presentations.[178] The trade secret provisions of the HCS may also restrict worker access to the identity of some hazards.

Second, even if the worker is presented with the appropriate hazard information, it may have no effect. The worker may suffer from information overload. Especially without a de minimis exemption, the standard might require warnings of so many substances that the impact will be diluted. The dual warning labels that may be required by the HCS and nonpreempted state laws may also lead to overload. There is also some evidence that the communication of hazard information may be ineffective because "workers ignore the information, are not rational in their decisionmaking due to personal biases and heuristics, and each worker may evaluate the information differently."[179] It will be particularly difficult to effectively communicate long term risks to workers.[180] Finally, unions may not have the resources to properly analyze hazard data for completeness and accuracy as well as to detect patterns of illness.

Even if the hazard information is communicated to workers and it induces them to take protective actions, their options might be quite limited. While employees may be able to reduce some risks by taking their own precautions, many occupational risks can only be addressed by changes in industrial processes or work practices initiated and approved by the employer. Given the disparity in power between the employer and employees, workers may not be able to significantly influence hazardous work practice. There is evidence that "workers in unregulated labor markets have been unable to obtain protection from hazards even when those hazards are well-known to the workers."[181] Also, the possible emergence of more effective defenses to tort actions by downstream workers may reduce the usefulness of tort suits for influencing industry practices.

Despite these potential problems, the HCS is nevertheless likely to have an important effect in reducing occupational injury and illness. There is empirical evidence suggesting that better hazard communication will increase workplace safety.[182] Workers can take precautions to reduce at least some risks. Disclosure of health hazards may also increase the "risk premium" in wages paid to workers, thereby providing a financial incentive for employers to reduce risk.[183] Other market and economic forces may also induce companies to reduce risks.[184] Downstream employers will be able to reduce their costs by choosing suppliers with less risky products. Insurance companies will have better information for setting differential premiums for workplaces based on their different risk levels. Finally, independent of the effect of the HCS in reducing illness, disclosing the information is important for moral reasons. "Without full knowledge of the hidden but discoverable health risks that result from exposure to toxic substances, workers cannot be said to have accepted the risks voluntarily."[185]

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[178] *Id.* at 993.

[179] Edwards, "Worker Right-To-Know Laws: Ineffectiveness of Current Policy-Making and a Proposed Legislative Solution," 15 *Envtl. Affairs* 1, 20 (1987). *(citations omitted).*

[180] *See* McGarity & Shapiro, *supra* note 89 at 1024-25, and n.153, *supra*.

[181] McGarity & Shapiro, *Id.* 1025.

[182] *See*, O'Reilly, *supra* note 136 at 111.

Unfortunately, there is no persuasive empirical evidence at this time about the effectiveness of OSHA's hazard communication program for reducing occupational illness. Although various hypotheses have been offered with predictions of several beneficial effects, the actual positive effects may not be as great as OSHA has predicted because of the limitations on the effectiveness of the standard discussed above. Consequently, while the HCS is a useful supplement to other OSHA standards, it has not been proven to be an adequate substitute for other regulations requiring reductions in exposure levels to specific hazardous substances.[186]

M. Conclusion

The stated purpose of the HCS is to "establish uniform requirements" in a generic hazard communication rule for workers.[187] The burdens and inefficiencies of having different requirements in every state and municipality across the country would be too high for companies doing business in interstate commerce. However, the goal of uniformity and the use of a single generic rule are in tension with the tremendous diversity of industrial workplaces and hazardous substances that must be regulated by a national standard. OSHA has attempted to address this tension by adopting a performance-oriented approach that attempts to provide flexibility for employers to implement the most reasonable hazard communication program for each workplace situation.

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[183] Note, "Occupational Health Risks and the Worker's Right to Know," 90 *Yale L.J.* 1792, 1802 (1981).

[184] See Baram, *supra* note 94 at 388.

[185] Note, *supra* note 183, at 1800.

[186] The Administrative Conference of the United States has recently recommended that OSHA continue "to approve information disclosure requirements as a *complement* to regulatory standards." Administrative Conference of the United States, Recommendation 87-10,(3)(b) 1987 ACUS 56 (1987) (emphasis added). *See also* McGarity & Shapiro, *supra* note 89 at 1025 (recommending that "OSHA should adopt information approaches to complement regulatory commands, but they should not be used as a substitute for health and safety standards.")

[187] 48 Fed. Reg. 53,281 (1983).

Two fundamental problems hamper implementation of the HCS. First, while a performance-oriented standard has many advantages, it raises many problems of interpretation and compliance because of its subjective nature. OSHA must address this problem by devoting greater emphasis and resources to compliance guidance and assistance. The second problem is that even with the flexibility of a performance-oriented standard, the uniform application of a generic hazard communication standard to all workplaces and all potentially hazardous materials is inevitably over-inclusive. OSHA needs to have some mechanism for permitting limited variances and modifications of the standard for workplaces in which the advantages of nonconformity outweigh the needs of uniformity. In this regard, OSHA should consider the option of adopting a de minimis exemption for workplace hazards that present insignificant risks. Such an exemption would not only reduce the compliance costs and burdens of industry, but would also enable workers to focus their attention and priorities on the serious hazards that most need to be addressed.

III. EPCRA and EPA's Community Right to Know Program

A. Introduction

The tragic accident at Union Carbide's chemical production plant in Bhopal, India caused over 3,400 deaths and an estimated 200,000 injuries.[188] It also prompted Congress to consider the need for a federal law to protect the residents of communities in the United States from industrial accident hazards. After considering several options,[189] Congress enacted the Emergency

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[188] Note 277 *infra*.

[189] For example, the Chemical Manufacturing Safety Act, H.R. 965, 99th Congress, 1st Sess. (1985), proposed by Congressman James Florio to establish a federal program for licensing chemical facilities and regulating their safety.

Planning and Community Right to Know Act (EPCRA) in October 1986,[190] with broad support from industry, labor, public interest groups, and community officials across the nation.[191]

EPCRA is patterned to a considerable extent after the European Community's "Seveso Directive."[192] It mandates that operators of industrial facilities which make or use certain chemicals must provide accident hazard information to designated state and local officials, and requires these officials to use this information to develop emergency response plans for vulnerable communities within their jurisdiction.[193] EPCRA further requires the establishment of new state and local organizations responsible for emergency planning,[194] authorizes EPA to enact regulations to implement of the law,[195] requires industry to develop annual reports of all "chemical releases" to the environment,[196] and establishes that the accident hazard and chemical release information reported by industry must be made available on request to community residents.[197] However, EPCRA does not authorize EPA evaluation of facility safety, nor EPA regulation to prevent accident hazards (e.g., by regulation of facility siting, design or operations).[198] EPCRA is therefore unique among federal programs of social regulation in its reliance on risk communication between industry, state and local officials, and community residents to protect public health and safety. By its silence on the critical need for improving the siting, design and safe operation of industrial activities in order to prevent accidents in the first instance, the law implicitly relies on forces other than federal regulation to deter and remedy inadequate management of industrial facility safety. Thus, EPCRA is a prototype of a "new federalism" statute: it eschews federal licensing, inspection and standard-setting to solve a public health and safety problem and instead fosters state, local and private initiatives.[199]

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[190] Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§11,001-050 (Supp. IV 1986), which is designated as the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA").

[191] No footnote.

[192] Council of the European Communities, Directive on Major Accident Hazards of Certain Industrial Activities, 82/501/EEC (24 June 1982), as amended by 87/26/EEC (19 March 1987) and 88/8610/EEC (24 Nov. 1984); commonly referred to as the "Seveso Directive," Seveso being the Italian town where a Hoffman-LaRoche plant accident contaminated the community with dioxin. See discussion in H. Otway, note 28 *supra* at 10,11.

[193] For a useful summary of EPCRA provisions, *see Title III Fact Sheet*, U.S. Environmental Protection Agency (Aug. 1988), 194.

[194] EPCRA §§301.303.1

[195] EPCRA §328.

[196] EPCRA §313.

[197] EPCRA §324.

[198] In contrast, the Seveso Directive orders private firms to conduct an evaluation of accident risks and safety measures at their facilities, and to provide the resulting evaluation ("safety case") to national officials for review. The officials may then use their national authority to inspect and order corrective measures. Note 192 *supra*, article 5. *See* discussion in M. Baram, "Risk Communication Law and Implementation Issues in the United States and the European Community" in Symposium Proceedings, Boston Univ. Int'l. L.J., note 1 *supra*, at 28.

B. History

Over 6900 accidents involving the release of "acutely toxic substances" occurred in the United States from 1980 to 1985. These accidents led to 138 deaths and 4,717 injuries, temporary evacuation of some 217,000 persons, and other consequences yet to be measured (latent disease risk, environmental contamination, emotional distress, for example). In addition, the accidents are believed to have had an "average estimated cost" of approximately $30 million each (in 1984 dollars) with one accident "resulting in more than $100 million in estimated damages." Some 200 different substances were released in the events which caused death and injuries, including four high volume, industrial chemicals (chlorine, ammonia, sulfuric and hydrochloric acids) which were involved in 25 percent of the events causing deaths. Seventy-five percent of these accidents occurred in-plant, and the remainder during transportation, with the former accounting for 65 percent of the events causing death or injury. The chemical and allied products industry and the petroleum refining industry together accounted for 34 percent of the injuries and more than half of the deaths.These preliminary findings of a continuing study by the U.S. Environmental Protection Agency (EPA)[200] demonstrated that accidents involving chemicals are a ubiquitous and significant problem in the United States despite numerous federal, state and local laws which have been in effect for decades. The EPA findings, together with the occurrence of the major accident at Bhopal in 1984 and daily reports of new industrial accidents promoted strong public support for new federal laws to prevent accidental releases and promote emergency response planning, and to provide local officials and community residents the "right to know" company risk information.[201]

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[199] *See* note 16 *supra*.

[200] See "Executive Summary" of *Acute Hazardous Events Data Base Report*, Industrial Economics, Inc., Cambridge, Mass., Report for U.S. EPA, Washington, D.C., No. EPA-560-5-85-029 (Dec. 1985). For further information on transport accidents, not dealt with in this study, *see Transportation of Hazardous Materials*, U.S. Congress, Office of Technology Assessment, Washington, D.C. (July 1986).

Faced with this growing pressure, Congress, state and local legislators, agency officials, industrial firms and trade associations reponded. In 1985, EPA, without clear legal authority at that time to address industrial accident risks, developed and disseminated across the nation a guidance document for state and local officials and company managers, the *Chemical Emergency Preparedness Program (CEPP); Interim Guidance*[202] based on several features of the Seveso Directive[203] of the European Community and similar measures developed by the World Bank.[204]

At the same time, the Chemical Manufacturer's Association (CMA), the major trade association for chemical producers, developed its Community Awareness and Emergency Response Program (CAER) to demonstrate the chemical industry's willingness to share certain types of risk information (the Material Safety Data Sheets or MSDS's disseminated to workers under the OSHA Hazard Communication rule) with communities where chemical facilities were located.[205] CAER represented an about-face for the chemical industry which had traditionally restricted public disclosure of risk information.[206] Major chemical producers also voluntarily began to re-evaluate safety at their facilities, reduce quantities of hazardous chemicals stored on site, and impose more stringent measures to prevent accidents.[207]

But these efforts by EPA and industry did not deter states and municipalities from also acting. By late 1986, over 20 states and hundreds of municipalities had enacted new laws and regulations which mandated industrial risk communication and local emergency response planning. These enactments, based on state "police power," reinforced longstanding state and local laws for public safety e.g., laws authorizing fire marshall inspection, licensing of petroleum storage installations, and health officer control of activities which pose health risks to the community.[208] Some citizens' groups sought action by local officials to close industrial facilities which used toxic chemicals, and were successful.[209] The culmination of these developments was Congressional enactment of the federal Emergency Planning and Community Right to Know Act (EPCRA) in October, 1986.[210]

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[201] For example, *Report of Joint Public Hearings on Toxic Chemical Accidents in New York State*, Office of Attorney General of New York State, Albany, N.Y. (June 1986), documents a greater incidence of chemical accidents than the EPA report.

[202] CEPP was published by EPA in November 1985, and an estimated 20,000 copies were distributed over the next month.

[203] Note 192 *supra*.

[204] *See Guidelines for Identifying, Analyzing and Controlling Major Hazard Installations in Developing Countries*, and *Manual of Industrial Hazard Assessment Techniques*, World Bank (1985).

[205] For discussion of CAER and its implementation, see 1986 *CAER Program Report*, Chemical Mfr's. Association.

[206] No footnote.

[207] Personal communications from corporate officials and field research at Dow Chemical, Occidental Chemical, Vista Chemical and other chemical producers (1988-89).

EPCRA requirements for risk communication and emergency planning are allocated among federal, state and local officials and industry. These requirements are set forth in sections of the law on emergency planning, emergency notification, community right to know reporting, and chemical release reporting, which are discussed below in terms of their main features, EPA implementation, and the issues now arising as enforcement begins.

C. Emergency Planning

EPCRA provides that new state and local units of government be created to receive and use industrial risk information for preparation of local emergency response plans, and to make risk information available to the public on a right to know basis.[211] To develop this infrastructure, the governor of each state must designate a state emergency response commission (SERC) whose members have appropriate expertise.[212] The SERC must, in turn, establish local emergency planning districts within the state, and a local emergency planning committee (LEPC) for each district, composed of local officials and citizens representing certain skills and interests.[213]

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[208] For a review of these developments to early 1986, see M. Baram, "Chemical Industry Accidents, Liability and Community Right to Know," *Am. Jnl. Public Health*, v.76, n. 5 (May, 1986) 568. A current compilation of state laws is found in *Right to Know Planning Guide*, Bureau of Nat'l. Affairs.

[209] Citizens of Cambridge, Mass. succeeded in shutting down a special research laboratory at the A.D. Little Co. where research on the detoxification of chemical warfare agents was being conducted under U.S. Department of Defense contracts. The city's Health Officer issued the shut down order later justified by a risk assessment which concluded that risk to citizens from an accidental release was very remote but that there was a reasonable basis for the order. *See A.D. Little v. Commissioner of Health of City of Cambridge*, 395 Mass. 535 (S.J. Ct., 1985).

[210] Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§11,001-050 (Supp. IV 1986), which is designated as the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA").

[211] EPCRA §§301, 303.

[212] EPCRA §301 (a).

Each LEPC is thereafter responsible for preparing the emergency plan for its district, based in part on information that industry is required to provide--e.g., notifications from local industrial firms which have determined they are subject to EPCRA, and risk information from these firms, both to be submitted in accordance with EPCRA's report requirements.[214] LEPC's are also required to determine the resources they need, but federal funds to meet these needs are not provided by the Act.[215]

The emergency plan for each district must designate the local industrial facilities subject to the Act, community and facility emergency coordinators, persons in charge of emergency equipment, the local routes used for transporting certain hazardous substances, and other facilities which, due to their location, either exacerbate accident risks (e.g., natural gas facility) or pose special emergency response problems (e.g., hospital, school).[216] The plan must then delineate the operative features of emergency response including the measures to be taken by facility operators and local emergency and medical personnel in the event of an accidental release of a designated substance; methods for notifying emergency responders and the public; methods for determining the occurence of an accidental release and the population or area likely to be affected; and population evacuation plans.[217]

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[213] EPCRA §301 (b), (c). The districts may be existing political subdivisions (e.g., municipalities, counties) or newly defined regions. LEPC members are to include state and local safety officials, representatives of the media and community groups, and operators of facilities subject to the Act.

[214] EPCRA §303. Owners of facilities in the district which are subject to the Act have an affirmative duty to notify the SERC of this fact. EPCRA §302 (b)(2). A facility is subject o EPCRA "if a substance on the list [of extremely hazardous substances] is present at the facility in excess of the threshold planning quantity established for such substance [by EPA]." EPCRA §302 (b)(1).

[215] EPCRA §303 (b). EPCRA §305 authorizes the Federal Emergency Management Agency to provide $5 million to the states for hazardous materials program training.

[216] EPCRA §303 (c).

[217] *Id.*

Upon completion, the plan must be reported to the SERC for evaluation,[218] and is subject to review by Federal "regional response teams."[219]

To develop its plan, the LEPC must adopt rules which assure public notice and comment opportunities, public meetings, LEPC response to comments, and plan distribution.[220] The LEPC must also provide the industrial risk information it has received to members of the public, upon request, to implement the "community right to know" goals of EPCRA.[221]

Implementation has varied widely among the 50 SERC's and 3800 LEPC's nationwide,[222] due, in part, to the Act's limitations. For example, EPCRA does not preempt state or local law;[223] lacks detailed requirements for implementation; and does not provide EPA with authority to enforce emergency planning by SERC's and LEPC's. The Act therefore fails to promote uniformity. As a result, several variables in each state have influenced implementation and created a great diversity of results.[224] These variables include the availability of state funding and expertise for SERC's and LEPC's; the presence of industrial associations and public interest groups and their influence on government; and the multitude of preEPCRA laws and programs for protecting public safety in each state and the extent to which they conflict with and promote turf battles with the newly-authorized SERC's and LEPC's.[225] Given these variables, state implementation has been

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[218] SERC evaluation is to assure the coordination of the plan with the plans for other districts. EPCRA §303 (e). However, the SERC is not precluded from using other evaluation criteria to assure that the plan is adequate (e.g., criteria developed by state fire and safety officials under state law).

[219] These teams were established pursuant to the National Contingency Plan of the federal "superfund" law for the cleanup of hazardous wastes, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 et seq.

[220] EPCRA §301 (c).

[221] *Id.* Community "right to know" is provided by EPCRA §324, but is subject to trade secret protection, §322, and other restrictions, §312 (e).

[222] *See* the semi-monthly *Right to Know Planning Report*, Bureau of National Affairs, Inc. for implementation information (hereinafter RTK Report).

[223] EPCRA §321 (a)(1).

[224] An extraordinary diversity exists. *See generally*, *RTK Reports*, for information and anecdotes. For example, New Jersey's division into 588 districts, whereas the entire state of Georgia has been designated a single district. *RTK Report*, v. 1, n. 21 (July 7, 1988) 4.

[225] *Id. Also see State Implementation of EPCRA*, National Governor's Association (Sept. 1988). For example, responses to EPCRA may vary in accordance with the following characteristics: whether a state is "rural" and relies on volunteer fire departments, or industrial and has trained marshalls and full-time safety personnel; whether a state has vigorous public interest groups or is dominated by industrial chemical complexes and industry associations (e.g., Texas, Louisiana, New Jersey); whether a state has "home rule" and vested considerable authorty

"contextual." Some states have carefully integrated SERC's and LEPC's into the network of state and local agencies for public safety and provided new funds, some have subordinated EPCRA requirements to more stringent state programs, and others have simply let SERC's and LEPC's flounder amidst the complex array of state and local authorities.[226]

In addition, many firms have failed to meet their initial responsibility of determining whether they are subject to EPCRA, and if so, of notifying the cognizant SERC.[227] This is a critical determinant of the adequacy of subsequent LEPC planning functions, since firms which fail to notify also later fail to provide the risk information reports required by EPCRA, thereby further obstructing the development of appropriate emergency plans.

This breakdown in company compliance became apparent when 60% of the firms believed by EPA to be subject to the Act failed to so inform their SERC's by the May 17, 1987 deadline.[228] Noncompliance persists, but has evoked only mixed responses from EPA. In October 1987, an agency official acknowledged that EPA had taken no enforcement actions and was providing a "grace period" until industry awareness increases.[229] In December 1987, another official indicated that EPA would "possibly" take enforcement actions against "knowing violators."[230] And one year after the notification deadline, a third agency official said that EPA would "soon announce its enforcement strategy, targeting facilities that are "flouting the law."[231]

In addition, industrial compliance requirements have been blurred by EPA's efforts to change the list of substances and threshhold quantities, which is used to determine which firms are subject to notification.[232] This "section 302 list" of "extremely hazardous substances" and their threshhold quantities is subject to continuing modification and each modification is a lengthy process. EPA proposals to delete or add substances or modify threshholds take time to develop, are followed by Office of Management and Budget reviews, at glacial

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in local officials, or has a strong central government. State and local programs also rely on a wide variety of funding sources. *See RTK Report*, v. 1, n. 5 (Nov. 26,1987) 4.

[226] *Id*. For example, New Jersey's state program forges beyond EPCRA requirements, *RTK Report*, v. 2, n. 2 (Oct. 27, 1988) 2; whereas Massachusetts has recently shut down its right to know office and failed to reconcile conflicting state laws with EPCRA, Notification, Dept. of Environmental Protection (August 1989).

[227] EPCRA §302. *See* note 214 *supra*.

[228] *RTK Report*, v. 1, n. 2 (Oct. 15, 1987) 1.

[229] *Id*.

[230] *RTK Report*, v. 1, n. 6 (Dec.10, 1987) 2.

[231] *RTK Report*, v. 1, n. 18 (May 26, 1988) 2.

[232] EPCRA §302. *See* note 214 *supra*.

pace, and then are subject to judicial review. Compliance requirements have therefore become uncertain for many firms.[233]

Thus, diversity of implementation among the states is a consequence of many factors, including EPCRA's loose design, differing state contexts and the variables therein, industrial noncompliance, and EPA uncertainties about enforcement. Further, the agency has recently affirmed that it lacks authority under EPCRA to enforce emergency plan preparation by SERC's and LEPC's, and will rely on "strong incentives" instead.[234] Given these circumstances, it is not realistic to expect that EPCRA will achieve substantial uniformity in the development of emergency programs and plans among fifty states.

But this diversity can be viewed as a positive attribute if it produces plans which accurately respond to the differing accident considerations in each state and represent optimal use of the resources available in each state. The EPCRA challenge for EPA is to therefore accept diversity but somehow assure that 50 SERC's and 3800 LEPC's produce these positive results.

Thus, EPA must address three generic problems which thrive in this diversity and obstruct positive outcomes: the persistent low level (about 50%) of industrial notifications, the slow pace of emergency plan preparation by LEPC's, and major inadequacies in the content of many completed plans.

Analysis of industrial failures to notify SERC's has led EPA to conclude that this first problem lies mainly with smaller firms which purchase EPCRA-designated chemicals from large chemical manufacturers for various purposes[235] (e.g., to make paper, textiles, chips for computers, polyvinyl products, etc.). Although these firms routinely receive material safety data sheets (MSDS's) and labels with the chemicals they purchase in accordance with OSHA's hazard communication standard,[236] many do not consider themselves to be "chemical firms" and do not review EPCRA requirements, or lack the expertise or funds to understand and comply with the requirements, and have decided to forgo compliance and risk EPA enforcement.[237]

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[233] For example, the agency announced plans to delete 36 substances from the §302 list in November 1986. But OMB review followed, and EPA did not make its final deletion decision until Feb. 25, 1988. *RTK Report*, v. 1, n. 12 (March 3, 1988)1. Deletion of four other substances was made under court order. See A.L. Laboratories v. EPA, D. Ct., D.C., No. 87-1991-OG, and consolidated cases (Dec. 10, 1987). *See* EPA's Regulatory Agenda for its planned rulemakings to revise the list and quanitites, 54 Fed. Reg. 17,258 (April 24, 1989).

[234] *RTK Report*, v. 2, n. 9 (Jan. 19, 1989) 1. EPA's "strong incentives" include potential liability of public officials who fail to fulfill the planning process in the event of accident injuries, citizen lawsuits against SERC's and LEPC's for not providing risk information or completed plans, and voter dissatisfaction.

[235] Discussed by EPA officials at EPA Workshop on Chemical Accident Prevention, Washington, D.C. (July 24, 25, 1989).

[236] 29 CFR 1910.1200 (1988).

Delays in plan preparation by LEPC's, the second problem, have been considerable. Although plans were to be completed and submitted to SERC's by October 17, 1988, EPA reported in January 1989 that only 50 to 60 percent of LEPC's had done so, and that the quality of the plans varied widely.[238] For example, the Michigan SERC had received plans from only 14 of the state's 98 LEPC's, covering only 55 of the 1500 facilities in the state believed subject to EPCRA, by mid-January 1989.[239] Causes of this problem may include lack of LEPC funding and expertise, lack of LEPC accountability to EPA, SERC disinterest in supervising LEPC's, or conflicts and turf battles among state and local authorities, as discussed earlier. Another possible cause is lack of public interest in LEPC activities and few instances in which the "community right to know" has been exercised to secure information from LEPC's, circumstances which tend to diminish the urgency and importance of plan preparation.[240]

In addition, the potential tort liability of LEPC members for injuries which would be caused during use of an emergency plan, has been raised in many states, and has probably retarded LEPC progress. According to a SERC official in West Virginia, almost 85 percent of persons asked to serve on LEPC's refused unless protected from tort liability.[241] This personal concern about vulnerability to negligence actions and liability has been recognized as a "vexing problem" by EPA.[242] Because of uncertainities about state liability and immunity doctrines, advisory opinions have been sought in many states from private attorneys and state attorneys general.[243] To encourage LEPC membership, new inmmunities have been promulgated by legislative and executive actions in several states.[244]

A survey of state laws, conducted for EPA concluded that LEPC members in most cases are afforded significant protection from liability even if proven negligent in performing their duties, that the relevant legal doctrines vary considerably among the states, and that LEPC members should seek further advice from an attorney knowledgeable in the subject. According to Professor John Pine, the director of the study, LEPC members may be protected by various doctrines, including sovereign immunity, special statutory immunity, immunity for public officials performing discretionary or governmental functions, or statutory indemnification and insurance programs.[245]

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[237] Note 235 *supra*.

[238] *RTK Report*, v. 2, n. 10 (Feb. 2, 1989) 4.

[239] *Id.* at p. 2. Other examples are provided by Arizona, where the SERC reported receiving only 3 plans from the State's 15 LEPC's by the October deadline, *RTK Report*, v. 2, n. 4 (Nov. 10, 1988) 2; and New Hampshire, which anticipated receiving plans from only 15 of its 234 LEPC's by the deadline, *RTK Report*, v. 2, n. 3 (Oct. 27, 1988) 1.

[240] Note 238 *supra*.

[241] *RTK Report*, v. 1, n. 9 (Jan. 21, 1988) 2.

[242] *RTK Peport*, v. 1, n. 18 (May 26, 1988) 2.

[243] *RTK Report*, v. 1., n. 20 (June 23, 1988) 4; v. 2, n. 2 (Oct. 13, 1988) 4.

[244] *Id.*

The need to cure major inadequacies in the content of emergency plans, the third problem, ultimately involves the individual review of 3800 plans by 50 SERC's, and monitoring by EPA and regional response teams.[246] Many types of inadequacies have been found including lack of detail and serious omissions.

According to EPA, one LEPC's plan consisted of a mere two page addendum to a civil defense program and compared poorly with a detailed 275 page plan developed by another LEPC for a similar district.[247] The Michigan SERC found that the plan prepared for Midland County, home of major chemical producers, failed to designate procedures for fire and medical services, evacuation, and other offsite emergency functions.[248] The deaths of six firefighters in an explosion and chemical fire in Kansas City, Missouri, motivated Congressional scrutiny and led to a finding that loss of life could have been avoided if better information had been available about the chemicals at the site.[249]

Each of these three problems must be resolved if suitable emergency plans are to be properly provided, distributed and used. This will require several EPA initiatives and new collaborations with SERC's, OSHA, and chemical producers.

For example, to address the first problem of industrial failure to notify, largely by small firms which purchase and use the designated chemicals, a feasible approach for EPA would involve one or more of the following strategies.

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[245] J. Pine, "Tort Liability in Emergency Planning," U.S. EPA (1988). *Also see* Pine's earlier report, "Tort Liability of Government Units in Emergency Actions and Activities," U.S. Federal Emergency Management Agency (1988).

[246] Note 219 *supra*.

[247] Note 238 *supra*.

[248] *Id*. at p. 2.

[249] *See* "Fire and Explosion in Kansas City: Lack of Information About Hazardous Materials Jeopardizes Firefighters," 2d Rpt., Committee on Government Operations, 101 st Congress, 1st Sess., House Rpt. 101-124 (July 11, 1989). *Also see* "Explosion Reveals Holes in Right-to Know Programs," *RTK Report*, v. 2, n. 8 (Jan 5, 1989) 4; and reports of other accidents which endangered fire fighters due to inadequate information, e.g., *RTK Reports*, v. 1, n. 14 (March 31, 1988) 2; v. 1, n. 22 (July 21, 1988) 2.

(1) Promote efforts by SERC's for educating and counselling small businesses about EPCRA notifications, and provide SERC's with EPA technical support for identifying the small businesses likely to be subject to EPCRA.[250] SERC's include state officials who monitor and regulate many industrial firms in their other regulatory capacities (e.g., as state fire marshalls, state air toxics officials). Their experience and outreach systems should be fully used and reinforced with EPA technical assistance. EPA could promote SERC initiatives by holding regional meetings and training programs for SERC members, which would also enable knowledge transfers between SERC's. An EPA policy statement, guidance memorandum, and training programs for SERC's could stimulate SERC's to more aggressively deal with notification failures.

(2) Promote use of MSDS's which include guidance to all firms which purchase EPCRA-designated chemicals as to the EPCRA status and reportable quantities of the chemicals, and notification responsibilities (the MSDS's and labels now accompany most chemicals purchased by smaller firms). Several large producers of chemicals now do this on a voluntary basis,[251] and one now provides additional guidance materials and seminars for its customers.[252] EPA could promote an expansion of these valuable communications by all chemical producers, so that ultimately all EPCRA-designated chemicals, when sold by any domestic producer or importer, are accompanied by enlarged MSDS's which notify purchasers of EPCRA requirements, and how they can determine their own notification status. Modification of MSDS's to accomplish these results would require OSHA

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[250] For example, EPA's "chemical crosswalk" system, designed to help regional offices, SERC's and LEPC's to identify facilities likely to be subject to EPCRA. *RTK Report*, v. 2, n. 18 (May 25, 1988) 2.

[251] For example, Occidental Chemical, Vista Chemical. Personal communications and MSDS's received from these firms (1989).

[252] Dow Chemical is the major practitioner of this approach, as part of its marketing and product stewardship efforts. Personal communication and seminar materials received from D. Rausch and other Dow officials (1988-89). *See*, in particular, Dow's materials for its Regulatory Issues Seminar, distributed to its customers and distributors.

> rulemaking to amend its hazard communication standard,[253] or alternatively, EPA use of its EPCRA and Toxic Substances Control Act[254] regulatory authority to promulgate a rule which requires this information in an addendum to all MSDS's for chemicals designated on EPCRA's "section 302 list."
>
> (3) Promote efforts by trade associations at national and state levels to affirmatively provide EPCRA guidance to their member firms and their customers. Several associations now voluntarily provide regulatory information on request, such as the Chemical Manufacturer's Association, the Chlorine Institute, and the Vinyl Institute.[255]
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> (4) Develop a final position on EPA and SERC enforcement of industrial notification requirements.[256]

To address the second and third problems, namely the laggard performance of LEPC's and their preparation of inadequate plans, EPA must rely heavily on SERC's (which are authorized by EPCRA to supervise LEPC's) since it lacks enforcement authority against LEPC's. But since EPA also lacks authority to compel SERC's to more stringently supervise their LEPC's, the agency must resort to other measures similar to those suggested for the first problem discussed above. These include convening regional meetings to educate and train SERC members, and to promote the exchange of information among SERC's on how to stimulate and evaluate LEPC performance. EPA could also provide technical assistance to SERC's on how to evaluate emergency plans, and the methods of analysis and planning they should convey to LEPC's. Other options available to EPA are problemmatic: to exhort SERC's to use state law to enforce LEPC performance; to encourage citizen suits against SERC's "for failure to provide a mechanism for public availablity of information."[257]

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[253] 29 CFR 1910.1200 (1988). *See* discussion in Part II *supra*.

[254] The Toxic Substances Control Act, 15 U.S.C. 2601 (1976). Section 6 provides EPA with broad authority to regulate chemicals in commerce which pose unreasonable risks. If EPA finds that regulatory jurisdiction over a chemical posing an unreasonable risk lies with another agency (e.g., OSHA for chemical risks in the workplace), Section 9 sets forth procedures for EPA to follow, which essentially require EPA to initially refer the matter to the other agency, and to then regulate the chemical if the other agency chooses not to do so itself.

[255] Personal communications with members of several chemical user firms who have received useful information on regulatory issues from these associations, and review of various publications widely distributed by these associations. (1988-89). *Also see* note 205 *supra*. For a brief discussion of early CMA programs, *see Chemical Emergencies: Preparedness for and Response to Accidental Chemical Air Releases*, U.S. General Acctg. office, GAO/RCED-86-117BR (June 1986) 37.

[256] Pursuant to EPCRA §325. The policy should clarify EPA enforcement responsibilities vis-a-vis state and local enforcement under state law and under EPCRA §326, which provides in part that "Any state or local government may commence a civil action against an owner or operator of a facility for failure to . . . (i) provide notification . . . under section 302(c)."

D. Emergency Notification

An important risk communication required by EPCRA is emergency notification, the Section 304 requirement that when an industrial facility accidentally releases a designated amount of a listed chemical offsite, its management must immediately notify LEPC's and SERC's for the regions likely to be affected. This reporting function enables rapid mobilization of fire departments and other emergency responders, and timely use of emergency response plans.[258]

The requirement is triggered by the accidental release of any of some 725 substances on the CERCLA hazardous substance list, or the 360 substances on the EPCRA list of "extremely hazardous substances," in amounts which exceed designated quantities.[259] (Many chemicals appear on both lists.) If the release is contained on-site without human exposure off-site, or is a continuous or federally-permitted release off-site as defined by CERCLA, an EPCRA Section 304 report is not required.[260]

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[257] EPCRA authorizes such citizen suits, but success would depend on whether the lack of a plan, or an inadequate plan, constitutes a violation of EPCRA § 324(a) requirements that plans be made publicly available.

[258] EPCRA §304.

[259] CERCLA, 42 U.S.C. §9601, requires emergency notification for release of its designated chemicals, at section 103 (a). The CERCLA list and its reportable quantities (RQ's) appear in 40 CFR §302.4. The EPCRA list is mandated by section 302 (a)(2), as previously discussed. *See* 52 Fed. Reg. 13,378 (April 22, 1987); and 40 CFR §355, App. A. Each list designates reportable quantities, or is subject to a statutory RQ: e.g., EPCRA provides that the RQ shall be one pound for substances on its §302 list until EPA establishes another RQ by regulatory action.

[260] On site releases are exempted from reporting under EPCRA §304 (a)(4), but are not exempted by CERCLA §103. EPCRA §304 (a) (2) (A) exempts continuous releases defined by CERCLA §103 (f) and federally-permitted releases defined by CERCLA §101 (10). 40 CFR 355. However, other laws will require reports for such incidents (e.g., to OSHA, State Air Toxics Board, etc.).

Notice must be given "immediately after the release" by telephone, radio or in person to the LEPC's and SERC's,[261] and must include the chemical name or identity, and estimates of the quantity, time and duration of the release.[262] Additionally, the company's notice must contain information about the medium (e.g., air, water) into which the chemical was released, known or anticipated health risks (acute and chronic), medical advice for exposed persons, evacuation and other precautions, and persons to be contacted for further information.[263] Further information on these matters must be provided by the firm in a follow-up report done "as soon as practicable after a release," and must also describe actions taken by the firm to contain the release and otherwise respond to it.[264] The initial notification and subsequent follow-up report provided by the firm are publicly available.[265]

Among its many enforcement functions under EPCRA, EPA claims it has accorded highest priority to violations of Section 304 emergency notification duties "by larger firms which present major risks," but has indicated it would be lenient with small firms not aware of EPCRA requirements.[266] Violators also face other enforcers. State and local officials, with greater awareness of accidents within their jurisdictions, have considerable enforcement authority under CERCLA,[267] and various state laws requiring spill notifications; and citizen suits are authorized by EPCRA against a firm which fails to provide its follow-up information,[268] unless EPA is pursuing enforcement.[269] Significant penalties are authorized by EPCRA: from $25,000 per day to $75,000 per day for repeated violations.[270]

In October 1988, EPA levied its first fine for a violation of Section 304 against a chemical laboratory for failing to provide a written follow-up report after it had accidentally released an estimated 180,000 pounds of chlorine in Springfield, Massachusetts. In addition to the $78,500 EPCRA penalty, the firm was assessed an additional $25,000 fine for failing to provide CERCLA notification. Class actions seeking $620,000 in damages were also filed against the firm.[271]

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[261] EPCRA §304 (b)(1). Special directions are provided for releases during transport of the designated substances.

[262] EPCRA §304 (b)(2).

[263] *Id.*

[264] EPCRA §304 (c).

[265] EPCRA §324. Although public availability is subject to the trade secret restrictions of §322, §323 provides for disclosure of trade secrets to medical and health personnel under certain conditions.

[266] *RTK Report*, v. 1, n. 12 (March 3, 1989) 4. *Also see* EPA's interim final rule on penalty assessment under EPCRA §325; 54 Fed. Reg. 21,174 (May 16, 1989); following its "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 CFR 22.

[267] *See* discussion in *RTK Report*, v. 1, n. 16 (April 28, 1988) 2.

[268] EPCRA §326 (a)(1)(A)(i).

[269] EPCRA §326 (e).

[270] EPCRA §325 (b).

At this time, it is not known if there is substantial compliance with the emergency notification requirement, which for many substances, is triggered by an accidental release of only one pound.[272] Numerous chemical spills and other accidents are reported in the media, but EPA has not released any data on Section 304 compliance, and to date, has not renounced its early view that small firms "unaware of EPCRA" should be dealt with "leniently."[273]

As EPA modifies the reportable quantities of many substances, which it is authorized to do by CERCLA and EPCRA, it will inevitably reduce the number of releases which merit emergency notification, since in most instances to date, the agency has acted to increase the release amount which requires the report.[274] In addition, potential tort liability may persuade some firms to remain silent, particularly for small spills, since the information required in the notification and follow-up report could be used to prove exposure, injury causation and increased risk of disease in personal injury actions arising from an accidental release.[275] Industrial reporting may also be significantly reduced by the outcome of the Agency's pending regulation which would define what air releases of toxic chemicals ought to be exempted, as "federally-permitted releases," from Section 304 notification requirements.[276]

> But there is a more fundamental issue raised by Section 304 than compliance or the scope of its applicability, namely its efficacy. Given compliance, would it really trigger timely emergency responses and protect public safety as Congress intended? Since Bhopal, much concern has been given to the problem of sudden airborne releases of toxic materials, and the rapidity with which toxic clouds travel into populated

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[271] *In re All Regions Chemical Labs, Inc.*, No. EPA 1-88-108. *See* discussion in *RTK Report*, v. 2, n. 3 (Oct. 27, 1988) 1.

[272] EPCRA §304 (a)(1)(C). *See* note 259 *supra*.

[273] *See* note 266 *supra*.

[274] *See* 54 Fed. Reg. 33,418 (Aug. 14, 1989) for EPA action raising reportable quantities for six hazardous substances on the EPCRA list, for 121 substances on the CERCLA list.

[275] However, firms must also consider the consequences of noncompliance for negligence actions. Noncompliance could be used to establish negligence per se. *See* discussion in *RTK Report*, v. 2, n. 20 (June 22, 1989) 4.

[276] *RTK Report*, v. 2, n. 22 (July 20, 1989) 1, discussing EPA's request for public comment on the issue, 54 Fed. Reg. 29, 306 (July 11, 1989).

> areas. After reviewing 2,151 toxic chemical accidents in New York state from 1983 to 1988, the state's Attorney General's findings cast considerable doubt on the efficacy of emergency notification for protecting the public: "A cloud of toxic gas can travel great distances in short times, depending on the wind and topography. If the wind is blowing at 3.4 miles per hour,. the cloud will cover a distance of about one mile in 17.6 minutes. This poses a nearly impossible challenge for emergency responders. It took emergency workers one and a half hours to evacuate 500 students from a school next to the FMC Corporation in 1984 after methyl isocyanate leaked from the plant. The chemical cloud took less than a minute to enter the school, which was 500 yards away. Two weeks later, the same chemical was released from the Union Carbide facility in Bhopal, India, resulting in over 3,400 deaths and 200,000 injuries.
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> Clearly, the high speed of dense clouds leaves very little time for spill detection, hazard appraisal, government and public notification, and finally, taking protective measures."[277]

Therefore, the efficacy of emergency notification is a problem which transcends industrial compliance. Notification will not be effective in many foreseeable accidents where the chemical being released poses acute hazards, is heavy and disperses rapidly in dangerous airborne concentrations, and where residences and institutions such as schools and hospitals are in proximity to the accident site. Section 304 notification requirements take time to implement, especially in the midst of an accident which demands company attention to workforce protection and the deployment of special equipment and personnel to contain and terminate the releases. For example, Section 304 requires that plant officials consult several chemical lists, and provide accurate information about the nature of the release, its anticipated hazards off-site, medical advice and other precautions. Care is required in developing this information, which consumes critical minutes, since faulty information may lead to special harms and will also have tort liability consequences. Once notifications are acomplished, additional time is needed for the emergency response plan to be implemented.

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[277] *New York Under a Cloud: The Need to Prevent Toxic Chemical Accidents*, Attorney General, N.Y. (May 1989) 17, 18.

Some large firms have developed methods for rapidly identifying releases, mapping gas cloud dispersions, and notifying LEPC's and others.[278] But small firms do not have, and cannot afford, these capabilities. Therefore, Section 304 fails to assure timely emergency action for many accident situations, a serious deficiency in EPCRA which requires that EPA and Congress re-evaluate and re-design emergency notification requirements, and place more emphasis on accident prevention, perhaps by providing for regulation of industrial safety practices and contingency plans.

Therefore, Section 304 raises two issues which should initially be evaluated by EPA, although action by others will be needed to address the problems that EPA is likely to find. First, there is uncertainty about industrial compliance with the Section 304 notification requirements, a matter which deserves EPA study and SERC data gathering in each state. If compliance is found to be low for certain industrial sectors (e.g., small businesses), or for certain types of releases (very small spills), EPA has sufficient authority to take various corrective measures: enactment of a more vigorous education program to reach small businesses; enactment of a more vigorous enforcement policy; promulgation of a rule requiring that the MSDS's for chemicals on the CERCLA and EPCRA lists contain an addendum setting forth reportable quantities and other emergency notification instructions for the particular chemical (as suggested earlier to rectify compliance problems under Sections 301-303 of EPCRA); and finally, promoting a greater effort by SERC's to supervise industrial reporting within their jurisdictions.

The second issue EPA should address is more fundamental, namely to determine whether Section 304's emergency notification is an effective means of deploying emergency response plans to protect the public, and to determine under what accident conditions it is likely to fail. The results of the study should be used by EPA or Congress to correct deficiencies.

For example, EPA could, by rule, define vulnerable zones, request SERC's to map these "vulnerable zones" where accident conditions are likely to overwhelm notification, as has been done in New York State, and then request that the SERC's take special measures to expedite notifications and otherwise improve public safety in these zones. The special measures could include, for example, SERC use of state fire marshall or other safety authority to inspect and evaluate the safety of certain industrial activities, to review the adequacy of facility contingency plans to cope with accidents in vulnerable zones and contain them onsite, and to order by state regulation more stringent safety measures and contingency plan efforts at risky facilities to prevent accidents. Another potential use of the study results would be for EPA to propose that Congress amend EPCRA to authorize EPA itself, or in conjunction with OSHA, to carry out such inspection, evaluation and regulation functions to prevent accidents in vulnerable zones; or alternatively, to provide EPA with authority to enforce SERC initiatives on vulnerable zones.

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[278] For example, many large chemical producers employ the SAFER system, or similar computerized systems for calculating gas cloud dispersions, graphically identifying areas at risk, and electronically notifying LEPC's, plant workers, and others. Personal communications with officials at Occidental Chemical and other firms (1988-89).

E. Chemical Inventory Reporting

Many firms which produce, use or store chemicals are now required by EPCRA to communicate additional risk information to state and local officials in the form of Material Safety Data Sheets (MSDS's) and Chemical Inventory Reports. These communications inform the recipients about chemicals at facilities within their jurisdiction, and thereby enable them to prepare coherent emergency response plans.

Under Section 311, facilities subject to OSHA Hazard Communication Standard (HCS) requirements for MSDS's must provide the MSDS's or a list of MSDS's, to the LEPC, SERC and local fire department.[279] Thereafter, the firms are under a continuing obligation to provide additional MSDS's (or a revised list) for any new chemicals brought on-site which are subject to the HCS,[280] and to provide a revised MSDS to replace one earlier filed when "significant new information" is discovered about a chemical.[281] However, MSDS reporting applies only when the HCS chemicals equal or exceed designated threshhold quantities.[282]

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[279] EPCRA §311. The original deadline of Oct. 17, 1987 was provided in §311 (d)(1)(A). At that time, only manufacturing facilities were subject to the OSHA HCS and had to file under EPCRA §311. The HCS was expanded by OSHA to apply to nonmanufacturing facilities, effective June 24, 1988. As a result, these additional firms became subject to EPCRA §311 requirements three months later (Sept. 24, 1988) in accordance with EPCRA §311 (d)(1)(B). See discussion of OSHA's revision of the HCS in Part II of this report. The option of filing a list is subject to requirements that the chemical or common name of each substance be included and that the list be organized by "hazard categories" which have been set by EPA as "immediate health hazard," "chronic health hazard," "fire hazard," "sudden release of pressure hazard," and "reactive hazard," 40 CFR 370.2.

[280] EPCRA § (d)(I)(B).

[281] EPCRA §311 (d)(2).

[282] EPCRA §311 (b). 40 CFR 370.20 (b)(1) provides thresholds for "extremely hazardous substances" (on the Section 302 list) at 500 pounds (or 55 gallons), or a threshold planning quantity (TPQ) set by EPA, whichever is less. For all other MSDS chemicals, a threshold of

The LEPC, if given a list of MSDS's, can secure the actual MSDS's from the firm;[283] and must thereafter provide them to "any person" on request.[284] It must also provide public notice that these materials are available.[285] Firms subject to MSDS reporting must then comply with Section 312 by filing an annual Chemical Inventory Report with the SERC, LEPC and fire department[286] on any MSDS chemicals present at the facility during the calendar year in quantities above designated thresholds.[287] The Inventory Report can be filed in either of two information formats, Tier I or Tier II, at the firm's election.[288] However, the recipients can secure the more detailed Tier II report on request.[289]

The Tier I format of the Inventory Report simply provides the firm's estimate of the maximum amount of the MSDS chemicals at the facility at any time during the year, their average daily amount, and their "general location."[290] Tier II requires that the same information be provided and in addition, the chemical or common name of each substance, a description of how each is stored, and its specific location.[291] Both types of reports are then available to the public, on request to the LEPC,[292] except that Tier II information on specific locations may be withheld at the firm's election.[293]

EPA has advised firms to secure Inventory Report forms from their SERC; "since many state commissions have additional requirements or have incorporated federal contents in their own forms."[294] The firms are also required by EPCRA to allow on-site inspection by the local fire department.[295]

10,000 pounds is in effect until Oct. 17, 1989, when it declines to zero pounds unless EPA sets another TPQ.

[283] EPCRA §311 (c)(1).

[284] EPCRA §311 (c)(2) and §324(a).

[285] EPCRA §324(b).

[286] EPCRA §312 (a)(1). March 1st is the annual filing date. §312(2).

[287] EPCRA §312(b). The thresholds are at 40 CFR 370.20 (b) (2) and are 500 pounds or an EPA-promulgaged threshold planning quantity, whichever is lower, for "extremely hazardous substances; and for all other MSDS chemicals, a series of declining threshold levels over a three year period, culminating in zero pounds for calendar year 1989, the third year. EPA is expected to revise the ultimate thresholds for many chemicals above zero.

[288] EPCRA §312(d); 40 CFR370.25.

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[290] EPCRA §312 (d) (1). *See Tier One Instruction*, U.S. EPA (Oct. 15, 1987).

[291] EPCRA §312 (d) (2). *See Tier Two Instructions* U.S. EPA (Oct. 15, 1987).

[292] EPRCA §324; 40 CFR 370.30; EPCRA §312 (e)(3).

[293] EPCRA §312 (d)(2)(F); EPCRA §324(a); 40 CFR 370.31.

[294] Title III Fact Sheet, U.S. EPA (Aug. 1988) 5.

[295] EPCRA §312 (f).

LEPC's are expected to use the MSDS's and Inventory Reports in preparing emergency response plans, SERC's in evaluating LEPC plans, and fire departments in properly responding to chemical emergencies without endangering fire-fighter safety. But the Section 311 and 312 communication requirements also stimulate other safety functions not expressly required by EPCRA, namely voluntary initiatives by firms and regulatory actions by local officials to prevent accident occurrence.

Many firms had never before systematically collected information on the quantities and location of chemicals at their facilities. These firms, particularly larger firms with multiple facilities dispersed across the nation, now find that compiling data for these reports provides them with several opportunities to reduce risks and liability at their installations. As a result, large chemical producers and end users (e.g., paper firms) are using the data to take voluntary initiatives to improve safety--for example, by ordering each facility to reduce the quantities of chemicals stored on-site, and to improve their siting and storage practices.[296] These initiatives are often cost-effective as well, since they enable firms to buy chemicals only as needed, to coordinate the purchasing functions of their multiple facilities, and to use information systems for better supervision of the chemicals they produce, purchase, store and use. Some firms have set and achieved the goal of reducing the amounts of hazardous chemicals stored on site below the threshold reporting levels for Sections 311 and 312, thereby reducing their regulatory burdens and improving community safety simultaneously.[297]

In addition, public availability of MSDS's and chemical inventories now provides the opportunity for community members and local officials to become informed about the chemicals in their midst, and to thereafter take various actions under state and local law to prevent accidents. For example, public pressure can stimulate fire department inspections and orders to improve safe storage of chemicals, and municipal appropriation of funds for the purchase of new emergency response equipment (e.g., warning sirens, chemical fire equipment). Thus, pressure from these informed citizens can lead to the exercise of state and local "police power" to more stringently inspect, regulate and even shut down risky industrial activities.[298] Further, residents acting individually or in a class action can use the public and private nuisance doctrines afforded by state law to seek compensation and injunctive relief in suits against facility owners.[299] These protective actions at the local level are unimpeded by EPCRA, which expressly provides that it does not preempt state or local law.[300]

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[296] Personal communications with officials at several large firms producing chemicals and at several large firms using chemicals in various manufacturing activities (1988-89). *See* fn. 302 *infra* regarding field research at several firms in a parallel project.

[297] *Id.*

Thus, by requiring industrial risk communication under Section 311 and 312 to enable local planning on how to effectively respond to an accident, EPCRA has also set two forces in motion for preventing accidents in the first instance without authorizing federal safety standards: industrial voluntary action and community activism. It does this by first requiring the industrial communications and creating a public right to know the industrial information, and by then relying on subsequent community concern to stimulate industry initiative and local control. In this fashion, EPCRA provides a "new federalism" model for preventing accidents, one which relies heavily on the desire of facility managers and other corporate staff to prevent liability and costly conflicts with citizens and local officials, and their ability to take the voluntary actions needed to improve safety and public trust in order to avoid the conflicts and costs.[301] As indicated earlier, evaluation of industrial responses to EPCRA indicate that many firms are indeed acting rationally to prevent accidents and losses.[302]

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[298] The state's police power function is grounded in the U.S. Constitution, and has long been exercised to provide state officials (e.g., fire marshalls, building inspectors) and municipal and county officials (e.g., fire chiefs, zoning and health boards) with ample powers to regulate the siting, design and operation of industrial facilities which endanger the public. See note 209 supra for discussion of use of municipal health officer authority in Cambridge, Massachusetts to shut down a research lab testing chemical warfare materials. For another recent shutdown, *see* "Suffolk Chemical Co. To Close Plant Under Consent Order With State Agency," *Toxics Law Rptr.*, BNA, Inc (March 18, 1987) 1155.

[299] Provision of injunctive relief or restraining order by a state court is rarely available in American tort law when the defendant is a firm whose operations are of economic value to the community. *See Boomer v. Atlantic Cement* (denial of petition to shut down cement plant in N.Y. state), 26 N.Y. 2d 219, 309 N.Y.S. 2d 312 (1970). Nevertheless, in some situations, such relief has been provided. *See Spur Industries v. Del Webb Development Co.*, 108 Arizona 178 (1972).

[300] EPCRA §321. The Act does preempt state law which would restrict fire department access to Section 312 facilities. EPCRA §312 (f).

[301] *See* M. Baram, *Corporate Risk Management*, note 1 *supra* at pp. 89-97, 145-149, for further discussion and early examples of voluntary initiative. *Also see* "Going Beyond EPCRA to Avoid Community Chemophobia," *RTR Report*, v.1, n.1 (Oct. 1, 1987) 4.

[302] *Id.* Also see EPA Report, note 303 *infra*. In addition, a two year study nearing completion, supervised by the Author at the Tufts University Center for Environmental Management, has involved extensive field research at the corporate headquarters and major

A "new federalism" approach does not assure uniform results or equal protection from industrial accidents, such as could theoretically be achieved by federal regulation of industrial safety. But the diversity of industrial activities involving numerous chemicals, community risk contexts, and public views of appropriate safety levels would defeat any uniform approach involving national standards. Accident risk is highly contextual in that it is subject to many local variables, as EPA has recognized:

> "chemical facilities are complex and require site-specific safety assessment and contingency planning ... [and] close collaboration between industry and the community ...."[303]
>
> "there is no single method of technology that works best in every situation ... the determination of what constitutes a state of the art technology for a particular facility depends on the individual circumstances of the facility -its location and layout, its process, the chemicals handled, and the hazards. ... Each facility must be considered individually. ..."[304]

Therefore, the Section 311 and 312 reports are vital features of EPCRA because they support both emergency planning and accident prevention functions. However, despite their importance, implementation has not been fully evaluated to date in terms of company compliance, LEPC use of the reports for planning purposes, or community use of the reports to prevent accidents.

What is known is that many larger firms are taking diverse steps to prevent accidents, as previously discussed, but these initiatives cannot be conclusively measured as to their effectiveness at this early time.[305] Also, it is now apparent that citizens have had difficulty securing and understanding the

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facilities of eight firms producing and using hazardous chemicals, in order to determine voluntary actions to reduce accident risks and routines releases, and to improve emergency response and risk communication with communities hosting major facilities. The report, to be published in late 1989, will indicate the nature, scope and results of numerous corporate voluntary initiatives. *See Corporate Risk Management Under EPCRA*, report to EPA, Tufts Ctr. Env. Mgmt. (forthcoming, fall 1989).

[303] *Review of Emergency Systems*, U.S. EPA (June 1988) at pp. iii, iv, the report to Congress mandated by EPCRA §305 (b).

[304] *Id.* at pp. 12, 13.

[305] The forthcoming Tufts Report note 302 *supra*, documents voluntary actions taken by eight firms, but does not measure overall corporate compliance or the effectiveness of the voluntary actions taken by the eight firms.

MSDS's and Inventories,[306] and that in many states, LEPC's and fire departments have been overwhelmed by the number of MSDS's and Inventory Reports submitted.[307]

Further, it now appears that the information requirements of Sections 311 and 312 may be deficient for emergency planning and endanger emergency responders.[308] For example, polyvinyl chloride (PVC) is not a reportable chemical under Sections 311 and 312 because it is not an OSHA HCS chemical requiring an MSDS (it lacks sufficient toxicity). But when PVC resin or other PVC products are "degraded" by a facility fire, they generate hydrochloric acid (HCL), an acutely hazardous chemical, thereby endangering uninformed firefighters and community residents.[309]

To sum up, Section 311 and 312 reports are essential for local officials to carry out two important public functions: emergency planning and accident prevention. But their usefulness for these dual purposes is uncertain in several respects. At this early stage in the availability of MSDS and Inventory information, EPA should determine if corrective measures are needed and how they can be made consistent with EPCRA's "new federalism" model, and then act to assure the measures are taken.

Therefore, EPA should first evaluate the effectiveness of Section 311 and 312 requirements for enabling LEPC preparation of suitable emergency plans, and for responsibly informing local residents and officials about accident risks. In conducting this evaluation, EPA should once again enlist the participation of SERC's, since SERC's are authorized by EPCRA to supervise LEPC's and review their plans, and are familiar with interest groups and local officials in the state and their concerns about accidents. The evaluation should be focused on the need for timely production of MSDS's and Inventories by firms, and for timely distribution of these materials to LEPC's and subsequently to citizens on their request. Production and distribution of the materials are compliance issues suitable for EPA enforcement under EPCRA and for SERC enforcement under state law. The evaluation should then focus on the substantive content of the materials in terms of their quality and presentation of information in a manner which is understandable and useful to LEPC's, fire chiefs and concerned citizens.

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[306] Professor Susan Hadden of the University of Texas surveyed residents of New Jersey and Massachusetts about their access to and use of company reports under EPCRA, and found that many complain of difficulties in obtaining the data from their LEPC's, and subsequent difficulties in understanding the MSDS's and inventories they received. She has concluded that these problems may account for the "low number of requests" being made for the information (200 over 3 years in N.J., 60 over 18 months in Mass.), but that the data has the potential, nonetheless, for having an "explosive effect" on the public, if readily available and understandable. *RTK Report*, v. 1, n. 24 (Aug. 18, 1988) 4.

[307] *See* "Right to Know Laws Burden Fire Departments," *RTK Report*, v. 2, n. 15 (April 13, 1989) 4; and "Sections 311/312 Could Be Paperwork Nightmare," *RTK Report*, v. 2, n. 21 (July 6, 1989) 4.

[308] The deficiencies endanger firefighters and other "first responders" to an accident, and thereby also obstruct effective containment and other response measures. *See* note 249 *supra*.

[309] PVC is not an OSHA HCS-designated chemical, nor does it appear on the consolidated list of chemicals covered in EPCRA, "compiled in *Right to Know Planning Guide*, BNA, Inc., pp. 531:1001-531:2022. HCL is an "extremely hazardous substance" on the EPCRA Section 302 list and the CERCLA §103 list, but it would not be reported under EPCRA §311 and 312 as a by-product of PVC degradation. Thus, a LEPC, firefighters and community residents would not be informed of the HCL hazard at a facility which stores and uses PVC resin and other vinyl products, unless the seller of the PVC resin had used HCS performance criteria, voluntarily designated PVC as an HCS chemical, and provided the PVC purchaser with an MSDS.

Following this evaluation, EPA should consider what reforms it can enact within its authority and EPCRA's "new federalism" framework. These may include, for example, EPA provision of model MSDS's and Inventories for educating firms, increasing its enforcement effort against firms in violation, and urging SERC's to supervise LEPC's and firms more stringently. Another possible reform that may be useful is EPA enactment of a rule requiring an addendum to each MSDS which would discuss the chemical in terms of its community risk potential and off-site emergency response needs; or alternatively, convincing OSHA to amend its HCS rule to provide this information (consistent with the Occupational Safety and Health Act which bounds OSHA authority). Many chemical producers are prepared to provide this information in MSDS's, and some do so now when they ship chemicals downstream to their industrial customers.[310] Thus, the MSDS would be modified to better serve the information needs of LEPC's and the community.

Finally, EPA should secure industrial assistance in identifying accident risks which may not be reported under Sections 311 and 312 because they arise as by-products of a chemical accident (such as the generation of HCL when PVC burned). This information is known to chemical producers and should be routinely provided downstream industrial customers in MSDS's, who would then pass this information on to LEPC's and fire departments. EPA (or OSHA) amendments to the HCS, discussed above, could be used to require the transfer of this information to protect emergency responders.

By this approach, EPS could improve the usefulness of Sections 311 and 312 for emergency planning and accident prevention. However, it may later find that citizens and local officials continue to respond insufficiently to accident risk information, despite the improved MSDS's and Inventories they have been receiving. Since EPA has no authority to provoke citizen action and local regulation, it would then face the issue of whether it should propose to Congresss that EPCRA be amended to either provide the agency with authority to set national safety standards for industrial activities, or with authority to compel LEPC's or SERC's to inspect and regulate faciltiy safety.[311]

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[310] Personal communications with corporate officials at Dow Chemical, Rohm and Haas, and Occidential Chemicai (1988-89). Also see I. Rosenthal, "The Occupational Safety and Health Act: Where Do We Go From Here," Am. Ind. Hyg. Assoc. Jnl. 49 (March 1988), for similar recommendations on enhancing the MSDS.

F. Chemical Release Reporting

EPCRA's final requirement for industrial risk communication is set forth in Section 313 which mandates the notorious Toxic Chemical Release Report. This annual report differs from other communications (under Sections 302, 304, 311-312) in that it requires facilities to provide EPA and SERC's with information on their chemical releases to air, water, and land from routine or normal facility operations, as well as from accidents and other unintended occurrences. Although this report contributes information useful for emergency planning, its main purpose is "to inform the public and government officials about routine releases of toxic chemicals to the environment . . . [and to] assist in reseach and the development of regulations, guidelines and standards."[312]

Of all EPCRA requirements, this report has stimulated most industrial concern because public availability of its data on routine releases has high potential to provoke community anxieties about long-term health hazards, and can thereby lead to new and stringent standards governing routine activities at industrial facilities This type of regulation would be more intrusive than traditional pollution controls in that it would necessitate deep changes in industrial processes which would be costly to implement.

Plant managers were warned early of this potential by the Chemical Manufacturer's Association:

> " Section 313 gives people in your community the opportunity to see estimated quantities of chemicals routinely or accidentally released. A national data base to be maintained by EPA will allow anyone to access this quantitative data about your facility directly. This may significantly affect your community relations, and you should

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[311] No footnote.

[312] *Title III Fact Sheet*, U.S. EPA (Aug. 1988) 6.

> prepare now [July 1987] to respond to questions and concerns, especially about impacts on public health."[313]

Subsequent developments have justified this industrial concern. Now that Section 313 reports have become publicly available, numerous campaigns are under way to regulate firms more intrusively and stringently than ever before.[314]

Section 313 provides that facilities[315] which manufacture, process or use chemicals on the "toxic chemicals list," in quantities exceeding designated thresholds during a calendar year,[316] must prepare a Chemical Release Report for such chemicals and submit it to EPA and the cognizant SERC by the following July 1st.[317] The "toxic chemical list" is different from the "extremely hazardous substance list" of Section 302, and other lists which apply to other EPCRA report requirements. EPA, by using its authority to add or delete substances,[318] or to modify the thresholds of listed substances,[319] can dramatically change the numbers of firms subject to

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[313] *A Manager's Guide to Title III*, Chemical Mfr's Association (July 1987) 57.

[314] See "Taking Inventory of 7 Billion Toxic Pounds: The Top 500 Counties--The Most Common Chemicals," USA Today (Aug. 1, 1989) 6A, 7A; and "TRI Data cited in Call for Air Toxics Controls," RTK Report, v. 2, n. 14 (March 30, 1989) 4.

[315] A facility subject to Section 313 reporting is one which has 10 or more full-time employees, is in Standard Industrial Classification Codes 20-39, and "manufactured, processed or otherwise used" the designated chemicals in quantities exceeding their specified threshold levels during a calendar year. EPCRA §313 (b) (1). Additional facilities can be designated by EPA, or by a state governor (regarding facilities in the state) if warranted by various risk factors (e.g., toxicity, proximity to population or other facilities, etc.). EPCRA §313 (b)(2).

[316] EPCRA §313 (a), (c). For the current list of 308 chemicals and 20 broadly defined compounds, see 40 CFR 372.65. The original "toxic chemical list" was specified by Congress, EPCRA §313 (c), and was based on the lists used for similar reporting by the states of New Jersey and Maryland, which contained 329 chemicals. Title III Fact Sheet, U.S. EPA (Aug. 1988) 6. EPA is authorized to modify the list, provided its action is supported by specified findings, EPCRA §313 (d)(1), (2), (3).

[317] EPCRA §313 (a). The report is to be provided on EPA Form R, the Toxic Chemical Release Inventory Reporting Form, devised by EPA in accordance with EPCRA §313 (g) requirements.

[318] EPCRA §313 (d)(1), (2), (3).

[319] EPCRA §313 (f)(2). The thresholds prescribed by EPCRA are 10,000 pounds of a listed substance used at a facility per year; and for listed substances made or processed at the facility, are 75,000 pounds for calendar year 1987, 50,000 for 1988, and 25,000 for 1989 and years thereafter. For definitions of "manufacture," "process," or "otherwise used," see EPCRA §313 (b)(1)(C), and EPA's regulation on §313 reporting at ___ Fed. Reg. ___ (Feb. 16, 1988). EPA's final rule provides additional details. For example: if more than one threshold applies to a facility (e.g., manufacture and use thresholds), the operator must report, if it exceeds any of the thresholds, on all activities at the facility involving the listed chemical. 40 CFR 372.25 (c); if the

Section 313 reporting. In its Chemical Release Report, the firm must provide information on the business conducted at the facility; whether each chemical is made, processed, or "otherwise used" at the facility (including categories of use); the maximum amount of each chemical at the facility during the year; the waste treatment and disposal methods used and their efficiency; off-site locations to which the firm sends toxic wastes; and the annual quantity of each chemical released into environmental media (air, water, land).[320] EPA has defined "releases to the environment" broadly to include intentional and routine releases of pollutants (e.g., "Stack Air Emissions"), sudden accidental releases (such as spills) and slow, unintended releases such as leaching and leaking (e.g., "fugitive emissions" from joints and valves).[321] To calculate the release inventory EPCRA permits the use of "readily available data" (such as monitoring data collected under permits which authorize certain releases) and "reasonable estimates;" and provides that the Act does not impose any new monitoring requirements.[322] Nevertheless, compliance has been complex and costly for industry, necessitating the training of personnel, many hours of expert analysis, and new instrumentation and methods for measuring certain types of releases (e.g., fugitive emissions).[323] Chemical producers are also required to inform certain industrial customers about the chemicals they are purchasing to enable customer compliance with Section 313. The "Supplier Notification Requriements" enacted by EPA for this purpose[324] requires producers (and importers) of listed chemicals (or of mixtures containing listed chemicals) to notify their customers who use these products in subsequent manufacturing activities (e.g., paper mills and other end users of the chemicals) or who subsequently distribute the products to their own customers for use in manufacturing.[325] The "supplier notification" must be in writing

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listed chemical is present in a mixture in a concentration below 1 percent of the mixture (or .1 percent if a carcinogen), the operator need not not consider the quantity of the listed chemical in the mixture when determining whether a threshold has been met, or in determining the amount of the release (the "de minimis" exemption). 40 CFR 372.38. Other exemptions are provided for "articles," certain product uses and laboratory activities. Id.

[320] 320. EPCRA §313 (g)(1)(C) (i-iv).

[321] 40 CFR 372.3. Also see EPA Form R, note 317 *supra*, at pp.19.20. However, the Agency has refused to adopt proposals by environmental groups to require "peak release data." RTK Report, v. 2, n. 22 (July 20, 1989) 4.

[322] EPCRA §313 (g) (2).

[323] "Title III Reporting: What Are the Costs," K. Kelley, et al, Hazmat World (Sept. 1988) 18. Personal communications with officials at several large firms producing or using the listed chemicals (1988-89).

[324] 40 CFR 372, Subpart C.

[325] The producer's duty to notify downstream distributors, brokers and users assures that the information will be distributed throughout most industrial sectors of the product life cycle, and

and accompany or be included in any MSDS's required by the OSHA HCS to be distributed to downstream customers. Customers must also be informed by the producer that the notification must accompany any MSDS's they are subsequently required (by the HCS) to provide to their own customers.[326] The contents of the notification must include a statement that the product or mixture contains a toxic chemical(s) subject to Section 313 report requirements; the name of the chemical and its Chemical Abstracts Service (CAS) number; and the percentage by weight of each listed chemical in the product or mixture.[327] However, if the producer considers a chemical's identity to be a trade secret, a generic chemical name can be substituted, provided it is descriptive of the structure of the chemical. Similarly, if the producer considers the specific percentage by weight of the chemical to be a trade secret, the producer may substitute information on the "upper bound" of the chemical concentration in the product instead.[328]

The Chemical Release Reports are to be submitted annually to EPA and state officials[329] to inform the public about releases to the environment, and "to assist government agencies, researchers, and other persons . . . to aid in the development of appropriate regulations, guidelines, and standards . . ."[330] Once submitted, each report is publicly available,[331] and is to be entered in an EPA-administered "national toxic chemical inventory" for the purpose of providing release data "by computer telecommunication and other means to any person . . ."[332] Uses of the data by EPA, other federal agencies, the states, and the public are to be evaluated by the Comptroller General and reported to Congress by mid-1991.[333] Over 19,000 facilities filed their first Release Reports covering the 1987 calendar year in 1988. On June 19, 1989, EPA announced that its computerized data base (the "toxic release inventory"

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enable these downstream firms to comply with Section 313 report requirements. 40 CFR 37246. Also see Supplier Notification Requirements, U.S. EPA, 560/4-88-008 (Sept. 1988).

[326] Id. 40 CFR 372.46.

[327] Id. Notification is not required if the listed chemicals are present at "de minimis" levels, e.g., below 0.1 percent by weight for carcinogens, and below 1 percent for other listed chemicals.

[328] Id.

[329] EPCRA Sec. 313 (a).

[330] EPCRA Sec. 313 (b).

[331] EPCRA Sec. 324 (a).

[332] EPCRA Sec. 313 (j). EPA is also required to have the National Academy of Sciences carry out a "mass balance study" for several purposes, e.g., to determine the efficiency of waste reduction measures at facilities and the efficacy of toxic chemical regulations enacted under other laws. EPCRA Sec. 313 (i).

[333] EPCRA Sec. 313 (k).

or TRI) was available to the public. It also released a report analyzing the data, The Toxic Release Inventory: A National Perspective - 1987,[334] which indicates that enormous quantities of toxic chemicals are being routinely released by industrial facilities into all environmental media. The data has had a considerable impact on the public, whether presented on a nationally aggregated basis (18.0 billion pounds of TRI chemicals released in the U.S., including 2.7 billion to the air, and 9.6 billion to surface waters), or on a local basis (76 facilities in Memphis, Tennessee reported releasing 82 million pounds).[335] Media uses of the data have proliferated,[336] and environmental interest groups have campaigned in many states for remedial measures.[337] EPA has found the releases "unacceptably high" and "underscoring a need for a pollution prevention program to complement existing regulatory efforts";[338] and federal and state legislators have called for additional funding of regulatory efforts and stronger legislation to control toxic air releases, in particular.[339] Industry has sought to calm public anxieties and reduce pressures for new regulatory programs with a flurry of public announcements. These describe, for example, corporate policies for waste minimization and pollution prevention, new equipment and expenditures, declining amounts of chemical releases over the past several years, studies showing no discernable health effects on their work force exposed to the chemicals for many years, new commitments to reduce releases by 90% or more, and methods that should be used by the public to assess their health risks (e.g., risk comparisons, risk-benefit analysis, etc.).[340] Many of these representations about waste minimization or release reduction are supported by data showing declining release levels in company reports filed for calendar years 1987 and 1988.[341] Thus, Section 313 requirements have stimulated larger firms, often acting with their trade associations, to take these positive steps. EPA has three functions under Section 313: (1) to assure that the Release Reports are produced and distributed by industry as required, by providing guidance and using its enforcement powers;[342] (2) to assure that the reported data is stored in the Toxics Release Inventory and accessible to the public;[343] (3) to use the reported data to set priorities; allocate responsibilities among federal, state and local agencies; and use its own regulatory authority under its various enabling statutes when appropriate.[344] For the guidance and enforcement function, the agency initially provided educational programs and materials (on analytic and other aspects of measuring and reporting releases).[345] This facilitated industrial compliance; however, only some 19,000 facilities of the 30,000 believed to be subject to Section 313, filed Release Reports.[346] Despite this underreporting, EPA recieved a large amount of information for calendar year 1987 which was useful for several analytic purposes, and when the information became available to the public, it stimulated public pressures and positive responses from leading firms. Thus, underreporting did not prevent considerable public education and industry initiatives, and did not necessitate immediate and rigorous enforcement by EPA. Beginning in 1988, the agency outlined its enforcement program which involves a two-pronged strategy.[347] For firms which reported but committed minor errors, a lenient approach is to be taken, involving noncompliance notification and a short-time period for

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[334] "Chemicals-in-Progress Bulletin," Office of Toxic Substances, U.S. EPA, v. 10, n.3 (Sept. 1989) 2.

[335] *The Toxics Release Inventory: A National Perspective - 1987*, U.S. EPA, 560/4 - 89 - 005 (June 1989) 4, 309.

[336] *See*, for example, "The Top 500 Counties - The Most Common Chemicals," *USA Today* (Aug. 1, 1989) 6A.7A showing county rankings beginning with Calhoun County, Texas (Number 1 with 579,242,000 pounds).

[337] Public Interest Research Groups (PIRG's) have campaigned in many states and introduced bills for toxic release reduction. For general background on such campaigns, see L. Martin, "Demanding Waste Reduction: The Roles of Public Interest Organizations in Promoting the Institutionalization of Waste and Toxics Reductions," *Env. Professional Jnl.*, v. 11, n.2 (1989) 132.

[338] *International Environmental Rptr.*, (May 1989) 254.

[339] *International Environmental Rptr.* (April 1989) 192; *Environment Rptr.* (May 19, 1989) 154; (June 16, 1989) 436.

[340] *See* company case studies and chptr. 6 on Release Reduction in forthcoming report to EPA, note 302 *supra*, for detailed information on eight corporate responses to EPCRA Sec. 313. *Also see* EPA's *TRI Report*, note 335 *supra* at 259; and various public announcements by 3M, Monsanto, Dow, etc.; for example: "Waste Reduction: Public Knowledge is Key to Continued

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Improvement," Dow Chemical (Aug. 15, 1989), describing a 44 per cent reduction in Section 313 chemical releases between 1984-1988, crediting employee efforts in Dow's waste reduction and product stewardship programs; and *Community Relations Kit*, Dow Chemical (1989) for customers to use in addressing public concerns about release data.

[341] *Id. Also see Safeguards Report*, NICS (Kanawha Valley), (Nov. 1986) 24; "Chemical Release Reduction Policy," Chemical Mfr's. Ass'n. (April 1989), adopted by CMA members; and R. Bringer, et al, "Pollution Prevention as Corporate Policy: A Look at the 3M Experience," Environmental Professional Jnl., v.11, n.2 (1989) 117. Note that the changes in measuring and analytic methods account for release reductions reported by some firms [e.g., fugitive emissions].

[342] EPCRA §325 (c) provides for a civil penalty of up to $25,000 for each violation of a Section 313 requirement.

[343] EPCRA §313 (j).

[344] EPCRA §313 (h-l.).

[345] For example, "Estimating Releases and Waste Treatment Efficiencies for the Toxic Chemical Release Inventory Form," U.S. EPA (1988); several industry-sepcific guidances; and *EPA Form R*.

[346] *Int'l. Environment Rptr.* (April 1989) 192.

[347] *RTK Report*, v. 1 n. 14 (March 31, 1988) 2.

corrections to be made. If the notice is ignored, the agency is to assess a small fine and issue a second notice, which if also ignored, will lead to a larger fine.[348] For firms which ignored the report requirements, more aggressive enforcement action is promised,[349] with "highest priority" given to facilities in large population areas and in "sensitive environments."[350] As of May 1989, EPA had filed 51 enforcement actions, with fines assessed ranging from $5,000 (a Spokane electroplater) to $721,000 (large steel firm).[351] By September 1989, the agency announced it had sought $3.95 million in fines in actions against 85 firms for violations of 1987 calendar year reporting, and had issued 1,318 notices of noncompliance.[352] Its second function involves administration of the national data base and the provision of public access to the data. EPA has developed the data base, feeds it new report data, runs diverse analyses of releases (by region, industry, firm, chemical, etc.) and is routinely providing public access.[353] It has also sought to help state and local officials, health professionals and the public, interpret the data and understand its significance for human health by offering various guidances.[354] Thus, EPA has expanded its second function so that it now serves as the "learned intermediary" in Section 313 risk communications between industry and the public. This will be a challenging role, one subject to public mistrust of agency objectivity, advocacy uses of the data, and the technical uncertainties it faces in interpreting what the abstract and incomplete data indicates about the health status of specific persons. In doing so, the agency has adopted one of the premises for risk communication expressed by environmental health interest groups, namely, that risk is essentially a matter of public perception and values and should not be relegated to experts, or, as put by one of its senior officials: "TRI challenges the old theory that decisions about control of toxics should be left to the "experts," since the data are made available directly to the public, without analysis or interpretation."[355] Finally, EPA has grappled with its third function hesitantly and faces considerable problems. It is analyzing TRI data to determine priorities, but has not developed any coherent policy for allocating responsibilities to deal with the health risk implications of the data, nor has it moved far in putting its own considerable regulatory authority fully to use in mitigating the risks.The major regulatory outcome of EPA's analysis of the TRI data for calendar year 1987 has been its deletion of sodium sulfate from the list of Section 313 chemicals,[356] because the "available data do not demonstrate that the chemical causes or can reasonably be anticipated to cause significant adverse health or environmental effects as set forth in Section 31."[357] By this action, EPA deleted the one chemical that accounted for more than half of the releases reported in 1987.[358] The agency has also proposed the deletion of several other chemicals, has decided to retain others that have been challenged, and is reviewing numerous other listed and unlisted chemicals to decide on their status.[359] The agency is considering whether Release Reports to be submitted in the future should contain "peak release data," which is proposed by environmental organizations and strongly resisted by industry because it would necessitate extensive, even continuing monitoring of all releases from many parts of a facility. This data would inform EPA and the public about intense, short-term releases which may cause acute health effects in some instances.[360] Since discharges of Section 313 chemicals to surface waters were the dominant type of release according to TRI data, EPA has designed a major new effort to regulate more stringently these toxic releases from some 879 sources over the next three years. These point sources (627 industrial facilities, 240 municipal, 12 federal)[361] were identified by EPA using information from the states on their surface waters that had not met existing water quality standards, and from corresponding TRI data.[362] These firms will be required to comply with new ad hoc permit restrictions reducing their releases of Section 313 chemicals in order to meet water quality criteria governing the ambient levels of these chemicals in the receiving waters.[363] Regulatory authority to carry out these "individual control startegies for toxic pollutants" is provided to the states by the Clean Water Act, with state efforts subject to EPA review.[364] However, the agency has not developed a regulatory policy for the health hazard of greatest concern--the release of toxic chemicals into the air. These releases include routine emissions (including "peak releases") from facility stacks, nonroutine (accidental) stack emissions, and fugitive emissions (leaks from valves, joints, etc.) which are by-products of routine activities.[365] EPA's hesitation in addressing the air toxics problems revealed by TRI is not surprising, since it has failed to adequately regulate such pollutants since 1970 when the Clean Air Act[366] mandated its regulation of hazardous air pollutants.[367] The 1970 Act provides that EPA set national emission standards for air toxics on the basis of health considerations only, and further by using "an ample margin of safety to protect the public health."[368] EPA has struggled with this mandate and essentially refused to implement it, except for eight pollutants for which it has set standards.[369] Two factors have inhibited EPA: the absence of any safe threshold level for many toxics (e.g., carcinogens) which would necessitate zero emission standards under the statutory mandate, and the severe economic consequences that would follow.[370] Despite a recent interpretation of the Clean Air Act's mandate by the D.C. Circuit Court, which permits the agency to consider nonhealth (e.g., economic) factors after it has determined "safe" emisison levels,[371] the agency remains uncertain as to how to proceed for several reasons, including

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[348] *Id.*

[349] *Id.*

[350] *RTK Report*, v. 2, n. 16 (April 27, 1989) 1.

[351] "Legal Matters," listing the first 25 penalties, *Hazmat World* (Feb. 1989) 24.

[352] "Chemicals-in-Progress Bulletin," U.S. EPA, v. 10, n. 3 (Sept. 1989) 14.

[353] *Id.* at 15, 16 for examples of agency outreach to the public, offering special regional analyses, waiver of fees for LEPC's, etc. *Also see* note 335 *supra* on the TRI report, which contains diverse analyses as models for public use. 1988 Calendar year data has been promised the public by April 1990. *RTK Report*, v. 2, n. 25 (Aug. 31, 1989) 1.

[354] *See* "Risk Screening Guide for Toxic Chemicals Release Inventory," U.S. EPA, (Aug. 1989), and materials published by the agency's new Integrated Risk Information System" (Oct. 1988).

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[355] "Chemicals-in-Progress Bulletin," U.S. EPA, v. 10, n. 3 (Sept. 1989) 2. In keeping with this view, the agency now offers special regional analyses to the public, e.g., special inventories done on Vermont and Massachusetts for the Public Interest Research Groups in those states, etc. Id. at 16; and waives fees for LEPC access to the TRI data base.

[356] 54 Fed. Reg. 25,851 (June 20, 1989).

[357] "Chemicals-in-Progress Bulletin," U.S. EPA, v. 10, n. 3 (Sept. 1989) 15.

[358] Total releases of sodium sulfate in 1987, according to TRI, came to more than 12 billion pounds, largely as discharges to surface waters and public sewage treatment systems. *Id*.

[359] *Id*.

[360] *See*, "Industry Asks EPA to Reconsider Peak Release Data Plan," RTK Report, v.__, n. __ ( ) 4.

[361] Most of the 240 municipal releases were targeted because of significant industrial discharges into their sewage treatment systems; which subsequently lead to municipal release of toxic chemicals. The facilities which dominate the list of 617 industrial releases are mainly in the metal finishing, pulp and paper and natural gas sectors.

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[362] Reported in *Environment Reporter* (June 16, 1989) 433.

[363] The Act, 33 U.S.C. 1251 provides for these special strategies at §1314 (1). (FWPCA §304 (1)).

[364] 33 U.S.C. §1314 (1). *Also see* EPA's final rule interpreting this statutory provision, 20 ER 326 (June 2, 1989).

[365] *See* note 321 *supra*.

[366] 42 U.S.C. 7401.

[367] 42 U.S.C. 7412. For a review of agency performance and problems, see Note: "Toward Sensible Regulation of Hazardous Air Pollutants Under Section 112 of the Clean Air Act," *N.Y.U. Law Rev.*, v. 63 (June 1988) 612.

[368] *Id*.

[369] *See* 40 CFR 61.01 (1987) for the "NESHAPS" for asbestos, beryllium, mercury, vinyl chloride, benzene, radionucleides, inorganic arsenic and coke oven emissions.

[370] *See N.Y.U. Law Rev.* Note, note 367 *supra*.

[371] 824 F. 2d 1146 (1987) (en banc).

Congressional criticism of the court decision.[372] Given that the problem of regulating air toxics has persisted throughout four administrations, that Section 313 reports and TRI data clearly affirm the need to regulate air toxics, and that EPA remains baffled as to how to proceed, there is a clear need for Congress to act on the matter. Thus, risk communication under Section 313 has clearly raised the need for regulations, but regulatory response will not be forthcoming until Congress repairs or replaces the existing EPA program under the Clean Air Act. EPA should therefore define alternative approaches for congressional consideration. One that seems reasonable to present to Congress is the enactment of an amendment to the Clean Air Act which would allow EPA to supervise a state-run permit program similar to the "individual control strategy for toxic pollutants" now being applied to reduce the discharge of toxic chemicals into surface waters.[373]

G. Conclusion

EPCRA requires industrial risk communication to inform federal, state and local officials about chemical accident risks and releases of toxic materials to the environment. With this information, these officials are required to develop emergency response plans and other measures to reduce these risks to public safety and health. In addition, EPCRA provides for community right to know, affording public access to information provided by industry. This device ensures that agencies and companies are held accountable to public attitudes about the risks, and that the public can play a more informed and effective role in reducing industrial risks. But it also promotes pressures on industry to take voluntary initiatives which will improve safety and risk management.

This "new federalism" model for addressing public safety and health risks does not assure uniformity of result, but can lead to optimal solutions on a case by case basis. However, success depends on compliance by all parties with their responsibilities, particularly with regard to the timely production and distribution of materials which will be useful to federal, state and local regulators and to the public.

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[372] *See* S. Rep. No. 426, 98th Congress, 2d Sess. 15 (1984), which is discussed with other views of the *NRDC v. EPA* decision in *N.Y.U.L. Rev.* Note, note 367 *supra*. Also see A. Perellis, "Setting the Limit," *Hazmat World* (May 1989) 70.

[373] Note 364 *supra*. This proposal would contain various features of considerable complexity, e.g., the need to set many new ambient standards and require extensive dispersion modeling and monitoring systems in order to determine what emissions should be permitted at each facility. Another option for EPA consideration is the OSHA regulation on Table Z substances, similarly problematic in many respects. There will be no simple solution. *See* discussion of Congressional and other proposals in *N.Y.U.L. Rev.*, note 367 *supra*.

EPA faces several problems in administering this unique and complex mode. First, it must ensure timely production of the reports and their distribution by industrial firms to designated parties, a task which requires that it now clarify and carryout an effective enforcement program and rely more heavily on the state and local organizations established by EPCRA for assistance. Second, it must ensure timely and effective use of the materials by the state and local officials in preparing plans and developing necessary regulations, but since it lacks authority to compel these functions, it must develop other means of promoting state and local actions, or secure Congressional modifications to EPCRA which will empower EPA.

The third problem for the agency is to consolidate EPCRA's multiple lists and diverse requirements and guidances into a unified package of materials to facilitate industrial compliance and assure that firms provide useful information. In this regard, EPA should work with OSHA to modify the MSDS so that it serves as the basic information document for both worker and community right to know purposes, and provide model MSDS's or other guidances to industry to assure more uniformity and higher quality in risk communication.

Finally, the agency faces the fourth problem of responding to the implications of the reported information with appropriate regulatory actions under its own enabling statutes, or of ensuring that state and local officials have sufficient authority and use it efficiently. This requires EPA to develop intergovernmental regulatory strategies and secure Congressional authorization for their implementation.

IV. FDA's Patient Package Insert Program

A. Introduction

After six years of study, the Food and Drug Administration (FDA) promulgated its final rule requiring patient package inserts (PPI) for prescription drugs in September 1980.[374] FDA had found that patients received oral information of variable quality on these drugs from their physicians, and random and confusing information from other sources, but were not routinely provided sufficient information about risk or proper use.[375] It had also completed studies showing high rates of patient noncompliance with prescription drug regimens; and a correlation between patient knowledge about drugs and improved compliance.[376] It therefore enacted its PPI rule "to provide patients with information about prescription drug products that will promote their safe and effective use and to provide patients with adequate and meaningful information sufficient for them to participate in evaluating the benefits, risks, and proper use of prescription drug products."[377]

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[374] 45 Fed. Reg. 60,754 (1980); 21 CFR 203. Enacted on Sept. 12, 1980, the rule became effective Oct. 14, 1980.

The PPI rule, applicable to ten types of drugs for an intended three year period, required that manufacturers and distributors of these drugs provide consumer information sheets (inserts) to pharmacists and other dispensers, and that the dispensers then provide the inserts to patients filling new prescriptions.[378] The inserts for each drug were required to include information, in nontechnical language, on the drug's common medical uses, circumstances governing its use by patients, side effects and serious adverse reactions, and safety hazards and restrictions on patient activities following medication.[379]

This approach to industrial risk communication for products was short-lived, however. In February, 1982, the agency proposed to revoke the rule on the grounds that the goal of providing information to patients could be more effectively and efficiently achieved by private, voluntary methods.[380] Revocation was made final in September, 1982.[381] Since then, no similarly comprehensive or generic program has been developed by the FDA as a substitute to require drug firms to communicate risk information to the users of their prescription drug products.

B. History

The Federal Food, Drug, and Cosmetic Act requires the FDA to ensure that drug labeling and prescription drug advertising contain accurate information about drug products.[382] Traditionally, over-the-counter (OTC) drug products have been required to have labels which contain adequate instructions for their safe use, since OTC drugs are sold directly to consumers.[383] In contrast, prescription drugs have had minimal labeling requiirements: because the FDA assumed that physicians and pharmacists would adequately inform patients about the drugs they were prescribing and dispensing.[384]

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[375] 45 Fed. Reg. 60754-55. (1980).

[376] 45 Fed. Reg. 60758. (1980).

[377] 45 Fed. Reg. 60759. (1980).

[378] 45 Fed. Reg. 60,782-84 (1980).

[379] No footnote.

[380] 47 Fed. Reg. 7,200 (1982).

[381] 47 Fed. Reg. 39,147 (1982).

However, in 1960 the FDA enacted "full disclosure" labeling requirements for prescription drug products, which provided that any label making a claim for a prescription drug must provide pharmacists and physicians with information about "safe and effective" use of the drug products, including information about effects, dosages, frequency and duration of usage, hazards and side effects.[385] FDA later required that each prescription drug shipped to a pharmacist or physician must contain information that describes how to properly use the drug product.[386] These regulations were enacted to assure that pharmacists and physicians received adequate information from drug firms to communicate to patients, but did not require manufacturers to prepare risk information for patients using their drug products.

In 1974, the FDA took the further step of initiating a patient prescription drug labeling project to determine if the drug labeling requirements it had imposed for oral contraceptives should be extended to prescription drugs generally.[387] From 1974 through 1979, the FDA met with groups representing physicians, pharmacists, drug manufacturers, health professionals and consumer interests to discuss the concept of patient labeling for prescription drugs. It also sponsored conferences and studies to elicit further information.[388]

During this period, the FDA also began to selectively require manufacturers of certain drugs to provide patient information materials, thereby deviating from its traditional and exclusive reliance on doctors and pharmacists to inform prescription drug users.[389] Thus, by 1979, the agency had completed several studies, elicited the views of various interest groups, and gained some experience regarding the value of having drug manufacturers communicate risk information directly to drug users.

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[382] 21 U.S.C. §301 et seq.

[383] 21 U.S.C. §352(f)(1); 21 CFR §201.5.

[384] 21 U.S.C. §353.

[385] 25 Fed. Reg. 12,592 (1960); 21 CFR §201.100(d).

[386] 25 Fed. Reg. 8,389 (1961); 21 CFR §201.100(c).

[387] Patient labeling for oral contraceptives describes their risks, how they work, and how to use them safely and effectively. See 35 Fed. Reg. 9001 (1970); 43 Fed. Reg. 4,212 (1978); 21 CFR §310.501.

[388] 45 Fed. Reg. 60,754 (1980).

[389] FDA requirements that nontechnical information be provided by manufacturers directly to patients applied to a small number of prescription drug products:

Based on these developments, the FDA proposed regulations in 1979 that would require most prescription drug products to have "labeling" for fully informing patients.[390] This proposed action was primarily based on its finding that there were significant noncompliance rates for patients using prescription drugs, ranging from 30-80%, due in part to inadequate patient knowledge.[391] According to FDA, the process of successfully communicating drug information from health professionals to patients consists of five basic steps: the patient must (1) be exposed to the information; (2) pay attention to the information; (3) understand the information; (4) accept the information; and (5) remember the information.[392]

Following this model, FDA determined that patient information leaflets (which it referred to as "patient labeling") for prescription drugs, as part of a larger program to improve compliance, would reduce patient misuse of prescription drugs, whether it was due to lack of knowledge or other factors.[393] Further justifications for the proposed rule were also expressed by the agency as expected benefits: it would enable the patient to avoid drug interactions with other drugs and foods, prepare the patient for possible side effects, permit the patient to share in the decision to use the drug product, and enhance the patient-physician relationship.[394]

-Isoproterenol inhalation drug products:

33 Fed. Reg. 8812 (1968); 21 CFR §201.305.

-Oral contraceptive drug products: 35 Fed. Reg. 9001 (1970); 43 Fed. Reg. 4212 (1978); 21 CFR §310.501. (Requiring more detailed information to be provided, instead of the short leaflet which was initially required.)

-Estrogenic drugs: 42 Fed. Reg. 37,636 (1977); 21 CFR §310.515 (PPI is 35 paragraphs long).

-Intrauterine devices: 21 CFR §310.502 (Treating IUD's as prescription drug products); 21 CFR §801.427 (Treating IUD's as medical devices).

-Progestational drugs: 43 Fed. Reg. 47178 (1978); 21 CFR §310.501a (Medroxyprogesterone acetate); 21 CFR 310.50(b) (Diethylstilbestrol [DES]).

[390] 44 Fed. Reg. 40,015 (1979).

[391] 44 Fed. Reg. 40,021 (1979).

[392] 44 Fed. Reg. 40,019-20 (1979).

[393] 44 Fed. Reg. 40,021 (1979).

[394] 44 Fed. Reg. 40,019 (1979).

The preamble to the proposed rule catalogued dissenting views and agency responses. Some opponents argued that the proposed labels (information leaflets) would cause many patients to decide not to take drugs, or attempt self-diagnosis, or prescribe drugs to others. The FDA nevertheless held that patient labeling would reduce the misuse of prescription drugs by informing patients of the importance of using the drugs only as directed, and of the risks of improper use. In addition, the FDA cited the lack of any evidence that patient labeling already required at that time for certain prescription drugs (e.g., oral contraceptives) had any of these detrimental effects.[395]

Other concerns were raised about the psychological effects of the labels, namely that they would cause patients to develop suggestion-induced side effects, and reduce a drug's beneficial placebo effect. The FDA responded that informing patients about the side effects of a drug would have beneficial effects, e.g.,, a reduction in anxiety about possible effects of treatment, and these would outweigh the detrimental effects. As for the placebo effect, the FDA said that this effect was due to patient/physician communications, and would be increased by the patient labeling.[396]

Drug manufacturers, physicians and prharmacists further argued that patient labeling would stimulate litigation and increase their tort liability. The FDA countered that labeling would reduce potential liability by improving patient compliance with physician instructions, and by informing patients that "certain risks inevitably accompany drug therapy and that not all adverse effects are caused by deficiencies in the drug product or mistakes by the prescriber." The FDA also stated its view that it would be inappropriate to base policy on this consideration, since "[p]atient labeling is not intended to define the duty or set the standard of care manufacturers, physicians, pharmacists, or other dispensers owe to the patient who uses the product."[397]

The agency also referred to similar liability arguments made in earlier opposition to its patient labeling requirements for oral contraceptives,[398] and pointed out that its prediction that contraceptive labeling would "not affect adversely the civil tort liability of manufacturers, physicians, pharmacists, and other dispensers of prescription drug products" had not been refuted.[399]

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[395] 44 Fed. Reg. 40,022 (1979).

[396] 44 Fed. Reg. 40,022-23 (1979).

[397] 44 Fed. Reg. 40,023 (1979).

[398] 43 Fed. Reg. 4,212-15 (1978). Two major concerns about liability were expressed regarding patient labeling for oral contraceptives.

> 1. The partial exemption from strict liability afforded drug manufacturers where the drug product is properly prepared and accompanied by adequate directions and warnings would be substantially eroded and possibly eliminated by a patient labeling provision.

Opponents further argued that the proposed leaflets would interfere with the patient/physician relationship, would increase visits to physicians because patients would need additional reassurance about taking a prescription drug and would lose confidence in their physician's judgment if the physician's statements conflicted with information in the leaflet. Further, physicians would rely on the leaflets to inform patients about drugs and, consequently not talk to their patients. In response, the FDA stated it did not intend patient labeling to be "the sole source of information for patients about prescription drug products," and that in most cases, the leaflet would "merely restate and reemphasize" the information the physician had provided the patient when prescribing the drug. Therefore, patients would not be more alarmed by information in the leaflet, visits to their physicians would not increase, and they would be more likely to comply with the drug regimens recommended by their physicians.[400]

Finally, concerns were raised about the economic burden of the proposed rule on drug manufacturers, distributors and dispensers, including manufacturer costs of printing the leaflets and distributing them to pharmacies with the drugs; and the costs to pharmacists of storing the leaflets and distributing them when dispensing the drugs. But the FDA had analyzed economic consequences, and found that the costs would be "acceptable in view of the anticipated benefits to patients" and that "the potential economic savings" of alternative information systems did "not outweigh the benefits to

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> Manufacturers would be held liable because it would be extremely difficult to write understandable warnings and directions directed to the layman which would be deemed legally adequate.
>
> 2. Patient labeling requirements would expose pharmacists to legal liability predicated on the failure to dispense labeling or on the dispensing of wrong or outdated labeling.

In response, the FDA concluded that "the imposition of a requirement for patient labeling [would not] necessarily affect adversely the standard of civil tort liability which is imposed on drug manufacturers or dispensers." In addition, the FDA was confident "that pharmacists [could] devise distribution systems that [would] ensure that the proper labeling [was] distributed with each oral contraceptive drug product." See further discussion of liability at Note 442 *infra*.

[399] 44 Fed. Reg. 40,023 (1979).

[400] 44 Fed. Reg. 40,023-24 (1979).

patients from patient labeling they would receive under the [proposed] comprehensive information system."[401]

In refuting these arguments, the agency relied on its own extensive studies, its limited experience with patient-informing materials for a small number of prescription drugs, and the supportive views of consumer interest organizations. Nevertheless, it was apparent that the agency proposal, irrespective of its risk-reducing merits, had great potential for interfering with the well-established relationship bewtween patients and physicians, and would indeed establish a new relationship between patients and drug firms which would have tort liability implications.

Thereafter, FDA promulgated its final regulation in September, 1980 establishing requirements for the preparation, content and distribution of "patient package inserts" (PPI's) for ten types of drugs.[402]

C. Requirements

The PPI regulations provided for the development and distribution of patient information leaflets for ten types of drugs and instructed drug firms as to the information to be provided in the leaflets. The ten drug products initially subject to the regulation for an intended three year period were chosen by the FDA on the basis of four selection criteria:

(1) whether PPI's would affect the patient's decision to use the drug;

(2) whether PPI's would help prevent serious adverse effects;

(3) whether PPI's would increase patient adherence to the prescribed course of therapy; and

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[401] 44 Fed. Reg. 40,023-24(1979).

[402] 45 Fed. Reg. 60,754 (1980). 21 CFR 203. In its enactment on Sept. 12, 1980, FDA replaced the term "patient labeling," which it had used to denote information leaflets, with the term "patient package insert" in keeping with terminology in the health care industry at 60,754.

(4) the extent to which the particular drug is prescribed.[403]

Manufacturers of these drugs were made responsible for developing and distributing the PPI's to pharmacists and other drug dispensers. The dispensers were, in turn, required to provide the PPI's to patients when filling their new prescriptions for these drug types.[404] Special provision was made for hospital dispensers of the ten drugs to institutionalized patients and persons undergoing emergency treatment.[405] Exemptions from requirements to provide PPI's were made for prescription refills and for special situations where the prescribing physician had directed in writing that a PPI not be provided a patient.[406]

The rule provided comprehensive requirements for the information content of the PPI's. They were to be written in English, in nontechnical language, exclude "promotional tone or content," provide the established name of the drug, and a summary describing its common uses, proper use instructions, situations when it should not be used, serious adverse reactions and safety hazards.[407]

In addition, the PPI's were required to contain a more detailed discussion about proper use (including a statement that evidence is lacking to support certain uses when a "preponderance of the evidence" so indicates); information which the patient should provide to the physician before taking the drug (e.g., pregnancy); serious adverse reactions and safety hazards (to be printed in boldface type); precautions for the patient while taking the drug (e.g., driving; use of other drugs, foods, alcohol) including a discussion of risks to the mother and unborn child from any use during pregnancy, available data about excretion of the drug in human milk, and risks to the nursing infant; special precautions where warranted for children and elderly patients; and any evidence of carcinogenicity, mutagenicity or effects on reproduction (including animal studies and an explanation of how these relate to risk in humans).[408]

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[403] 45 Fed. Reg. 60,773 (1980). The ten drug types chosen were: ampicillins, benzodiazepines, cimetidine, clofibrate, digoxin, methoxsalen, propoxyphene, phenytoin, thiazides, and warfarin.

[404] 45 Fed. Reg. 60,782-83 (1980); CFR 203.24

[405] 405. 45 Fed. Reg. 60,783 (1980); 21 CFR 203.25

[406] 45 Fed. Reg. 60,783(1980); 21 CFR 203.26. Despite the exemptions, the regulation provided for a patient's ability to override the physician's decision: "the dispensers . . . shall provide a patient package insert to any patient who requests it when the drug product is dispensed."407.

[407] 45 Fed. Reg. 60,781 (1980); 21 CFR 203.20(a)(b).

[408] 45 Fed. Reg. 60,781-82 (1980); 21 CFR 203.20(b).

Further information to be provided pertained to the potential for drug dependance; how the patient should deal with overdosage or a missed dose; possible side effects (in terms of severity, frequency, organ systems affected, and remedial measures); a warning that the drug should be used only as prescribed; special handling and storage conditions; the method of administering (taking) the drug; and the name and address of the manufacturer, distributor, or dispenser.[409] Finally, the FDA specified print size and encouraged imaginative formats;[410] and promised that it would prepare and provide guideline PPI's for specific drugs, use of which would constitute manufacturer compliance with the content requirements of the rule.[411]

The final rule provided that PPI's were intended to promote safe and effective drug use, and enhance patient participation and capabilities for evaluating benefits and risks in drug use decisions.[412] FDA cited its studies and experience in predicting that PPI's would reduce excessive or inappropriate drug use, adverse drug reactions, and noncompliance with drug regimens;[413] and, thereby, lead to various health and economic benefits including a reduction in drug use, fewer visits to doctors and hospital admissions, and fewer lost workdays.[414] FDA presented the findings of its regulatory analysis of the costs and benefits of the rule,[415] which it admitted were incomplete and would necessitate further evaluation during its initial three year period of implementation.[416]

The benefits, based on the assumption that PPI's would lead to a 5% decrease in noncomplying drug use, were estimated to range up to $40 million in savings (from reductions in lost workdays, hospital admissions, physician visits and refilled prescriptions),[417] and exceeded the estimated cost of $21 million which would be borne by drug manufacturers, distributors, pharmacies and hospitals.[418] Finally, the agency promised that further evaluations of the efficiency and economic and other consequences of the PPI rule would be used to consider various modifications to the rule.[419]

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[409] *Id.*

[410] 45 Fed. Reg. 60,782 (1980); 21 CFR 203.22.

[411] 45 Fed. Reg. 60,782 (1980); 21 CFR 203.23.

[412] 45 Fed. Reg. 60,759 (1980).

[413] 45 Fed. Reg. 60,779 (1980).

[414] 45 Fed. Reg. 60,776 (1980).

[415] As prescribed by Executive Order 12,044 (March 23, 1978); 3 CFR 152.

[416] 45 Fed. Reg. 60,757 (1980).

[417] FDA estimated that the costs associated with noncomplying prescription drug uses of the 10 drugs and drug classes covered by the PPI program (lost productivity, stays in hospitals, revisits to physicians and refilled prescriptions) ranged from $396 to $792 million. As a result, a 5 percent decrease in noncomplying drug use could produce savings from $20 -$40 million. 45 Fed. Reg. 60,779-60,780 (1980).

[418] *Id.*

D. Program Evaluation

To keep its promise to evaluate the effectiveness of the experimental PPI Program, the FDA sponsored a Rand Corporation study to determine how PPI's might best be designed to communicate important drug information to the patient. This research studied alternative leaflet designs for three drugs: erythromycin, a commonly prescribed antibiotic; conjugated estrogens, female hormones used to treat symptoms of menopause; and flurazepam hydrochloride, a drug used to treat sleeping disorders. The study took place in Los Angeles County during the fall, 1979 and winter and spring, 1980.[420] Rand reported the following findings:

1. "PPI's are likely to be widely read . . . about 70 percent of those who received PPI's reported having read them."

2. "Many patients use PPI's as reference documents. Between 45 and 56 percent of those who received a PPI reported having kept it, and between 22 and 32 percent reported having read it more than once."

3. "PPI's lead to reliable gains in drug knowledge . . . PPI's appear to be an effective vehicle for getting more information to more people."

4. "PPI's seem to have little effect on how patients use a drug. [There was] no evidence that patients who received a PPI were any more or less likely to comply with the prescribed regimen or . . . alter their patterns of drug use . . . most . . . elected to take the drug once they had purchased it."

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[419] FDA promised consideration of the following options after full evaluation of the economic consequences of the PPI rule during its initial implementaion stage:

1. Whether and to what degree the agency should increase or reduce the number of drugs covered;

2. Whether to include coverage of refilled prescriptions;

3. Whether alternative delivery systems should be required or permitted;

4. Whether voluntary information systems can satisfy consumer needs; and

5. Whether the current regulation can be improved by building additional standardization or flexibility into distribution, handling, or delivery of patient package inserts.45 Fed. Reg. 60,777 (1980).

[420] Study results were published in D. Kanouse, S. Berry, et al, *Informing Patients About Drugs: Summary Report on Alternative Designs for Prescription Drug Leaflets*, Rand Corporation, Santa Monica (August 1981), (R-2800-FDA). The study produced six reports including a summary, two reports on methodology, and three reports on specific drugs.

5. "The costs of returned prescriptions are likely to be quite low . . . During the study, only three [out of more than 2000 prescriptions dispensed with PPI's] . . . were returned to pharmacies for cash refunds [rather than the one out of 60 originally projected]."

6. "PPI's do not, in general, lead patients to report more side effects." There was no difference in the number of side effects reported by patients who were provided with leaflets and those who were not.

7. "PPI's are unlikely to change the frequency with which patients contact their physicians." There was "no evidence that PPI's had any effect whatsoever on the number of times patients contacted their physicians."

8."Patients find written drug information helpful . . . Most patients who received PPI's reported that they found PPI's helpful in understanding the drug and its effects."

9. "The amount of explanation provided in a PPI makes very little difference in how much information patients understand or remember . . . There seems to be no advantage in wiriting PPI's that contain large amounts of explanation."

10. "PPI's that contain numerous specific instructions can lead to increased reporting of side effects and other adverse outcomes." It was suspected "that many patients find a barrage of specific behavioral recommendations unsettling and begin to monitor their physical states more closely, which may lead them to notice (or imagine) more side effects and to feel that they have experienced less improvement in their symptoms. Because all the leaflets . . . studied included at least some behavioral recommendations, [the] results do not lead [to the conclusion] that all such recommendations will have deleterious effects."

11. "There is little advantage to be gained by highlighting information about a drug's risks. Patients who received leaflets in which risk information was emphasized displayed no greater knowledge of risks than other patients."

12. "The simplicity with which a PPI is written has surprisingly little effect . . . The leaflet's complexity had no effect on how much respondents learned from them and very little effect on other outcomes."

13. "PPI's in outline format may reach a larger audience but with a different message . . . The outline versions appeared to induce some of the negative outcomes often predicted for PPI's in general - outcomes that [were not found] for most other PPI's . . . studied."

14. "Shorter leaflets convey less information than longer leaflets, but do so no better . . . There is apparently little advantage to be gained in a strategy of selectively presenting drug information in the hope that the reduced message will reach more people who will understand it better. Most patients can

readily handle PPI's of 1000 words or more without suffering information overload.[421]

These findings reported in mid-1981 disputed several key premises for the PPI rule, namely FDA's views that PPI's would reduce drug use and visits to physicians, and improve compliance with drug regimens and patient knowledge of risks. They further undermined the rule's requirements for comprehensive information to be provided the patient, hinted that the PPI's created patient anxieties, and indicated that neither simple nor complex presentations of information would achieve the intended benefits of the rule.

In addition, the Reagan administration had taken office in January 1981 and immediately issued an Executive Order[422] and other mandates for agency review and revocation of existing regulations, causing the FDA in April 1981 to stay the effective dates for the first five drugs subject to the PPI rule, pending evaluation of the rule.[423] According to the FDA, "The stays were justified on the basis that there needed to be further review of the questions that had continued to be raised about the program. Numerous comments had been received expressing the view that mandatory PPI's were unnecessarily burdensome, costly, and not consistent with Executive Order 12,291 . . . [and] that additional review of the PPI program was consistent with the spirit of the Executive Order."[424]

The convergence of the Rand study findings, the new administration's strong views about reducing regulatory burdens on the private sector, the FDA's original promise to continue evaluating and modifying the PPI as warranted by studies of its efficacy and efficiency, and strong opposition from the drug industry, pharmacists, and the health care sector led the FDA to propose revocation of the PPI rule in February, 1982.[425] FDA supported its proposed revocation with new findings that PPI was not necessarily the most effective way of informing patients; that various private sector initiatives could provide consumers with more information than would have been possible with PPI; and that these initiatives would be discouraged if PPI were to be continued. It also cited as serious deficiencies, the PPI design for providing patient information at the time of dispensing rather than at the time of prescribing, the estimated costs of the program, and strong disagreement about its value within the health care community which would impede its successful implementation.[426]

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[421] *Id.* at pp. 3-6.

[422] Executive Order 12,291, 46 Fed. Reg. 13,193 (Feb. 18, 1981).

[423] 46 Fed. Reg. 23,815; 23,739 (1981).

[424] 47 Fed. Reg. 7,200 (1982).

[425] 47 Fed. Reg. 7,200 (1982).

[426] 47 Fed. Reg. 7,200-01 (1982).

However, the agency indicated that the proposed revocation would not apply to PPI requirements that it had individually enacted for specific drugs, nor affect its authority to require individual PPI's for specific drugs through notice and comment rulemaking in the future.[427]

Finally, to demonstrate its continuing concern about patient drug information, the agency announced the establishment of an internal Committee on Patient Education. The Committee would educate consumers, facilitate private sector initiatives, evaluate information systems, and carry out other functions designed to promote better patient education.[428]

E. PPI Revocation and Subsequent Developments

The PPI saga ended when the rule, which had not been implemented, was officially revoked by the FDA on September 7, 1982.[429] FDA cited many of the reasons it had provided earlier in its proposed revocation notice, in particular that its evaluations had shown that alternative private sector programs were likely to be more effective, but would be stifled by PPI continuation; that costs of PPI would be excessive, and that implementation by the health care community would be problematic.[430] However, FDA expressed its continuing commitment to the principle that "patients have both a right and a need to know about the drugs they use," and reaffirmed its view that "consumers have not traditionally had available to them adequate information about prescription drug use."[431]

To support its contention that private sector initiatives held great promise as a superior alternative to PPI, FDA cited several:

1. The American Medical Association [AMA] would provide Patient Medication Instructions (leaflets containing drug information) to be handed out by physicians at the time of prescribing. By 1984, this program would cover some 200 commonly prescribed drugs.

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[427] 47 Fed. Reg. 7,202 (1982). The previously-enacted individual PPI requirements exempted from the proposed revocation are for the prescription drugs listed in note 389 *supra*.

[428] 47 Fed. Reg. 7,201 (1982).

[429] 47 Fed. Reg. 39,147 (1982). Revocation did not affect labeling of over the counter (OTC) drugs, nor existing requirements for professional labeling, at 39,149. Nor did it affect FDA authority to order PPI's for specific drugs on a case by case basis. *See* Note 389 *supra*.

[430] 47 Fed. Reg. 39,153 (1982).

[431] 47 Fed. Reg. 39,148 (1982).

2. The American Society of Hospital Pharmacists had published a "Consumer Drug Digest," (a book about prescription drugs) which was available to consumers at book stores.
3. The United States Pharmacopeial Convention was offering several publications for sale, including "The Physicians' and Pharmacists' Guide to Your Medicines."
4. The Retired Persons Services was providing package inserts with new prescriptions which were filled by its mail-order pharmacy service. This program would eventually cover up to 90 drugs or drug classes.
5. Biomedical Information was selling a layman's version of its "Compendium of Drug Therapy" (a publication originally provided only to physicians) directly to consumers.[432]

These private initiatives indicated to the FDA that consumers would have access to a wide variety of drug information and education programs in lieu of PPI's. The agency acknowledged that it could not guarantee that these programs would be successsful, but felt that "on the basis of their current development and the statements as to future plans by their sponsors, that these privately sponsored voluntary initiatives represent viable, promising alternatives."[433]

Since revocation, FDA has provided consultative and research services to the private sector organizations and "relied on volunteerism, rather than regulation."[434] But private sector performance since revocation of the PPI rule has not matched its initial promise.

According to Louis Morris of FDA's Division of Drug Advertising and Labeling:

> "The pharmaceutical industry, which had long resisted drafting and distributing patient information on their products, began to distribute leaflets describing the medication to the physician as part of their promotional materials. Currently, it is the exception, rather than the rule, for a brand name product not to have a patient information brochure.
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> However, these evaluations . . . [are] focused on the "production" side of the PPI equation. When we began to look on the "distribution" side, quite a different picture

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[432] 47 Fed. Reg. 39,151 (1982).

[433] 47 Fed. Reg. 39,152 (1982).

> emerged. Although many different organizations were producing many different drug information leaflets, a relatively small percentage of patients seemed to be receiving any of these documents. A national survey . . . in 1985 indicated that although 25% of patients reported receiving some written information at the pharmacy when they picked up their medication, this information was usually in the form of small stickers affixed to the medication vial. Only 6% reported receiving a brochure and 7% an instruction sheet. Only 9% reported receiving written information at the physician's office. These percentages were almost identical to data collected in 1982"...[435]

Morris found that even special patient education programs have failed. For example, a "multifaceted patient education program for propoxyphene, which can cause fatalities when used in conjunction with certain substances, included the distribution of a special PPI to pharmacies. Although 90% of pharmacies acknowledged receipt of the PPI, "when observers posing as patients filled valid prescriptions, only 5% received the leaflet spontaneously, 32% . . . if it was requested." Morris has contrasted this voluntary effort with the FDA-mandated PPI's for conjugated estrogens, which show 39% for spontaneous delivery to patients, 89% if requested, and concluded that "Whereas the distribution rate for mandatory PPI's was low, the rate for voluntary ones appeared paltry. Neither method seemed to provide assurance that a consumer would receive a necessary warning message."[436]

As a result, FDA has "moved away from [PPI] regulations as a means of assuring patient education and turned toward packaging solutions to assure that PPI's were delivered to the patient," as in the case of Accutane, a drug for cystic acne treatment which is also a known reproductive hazard (a teratogen). Early use of patient brochures proved to be ineffective, as evidenced by "a surprisingly large number of children with birth defects . . . born to women who had taken Accutane." FDA has therefore required that a PPI be an integral part of the product labeling, that the product be prepackaged in unit-of-use blister packs, and that the package have special cardboard panels which contain an extensive warning message and symbols to graphically indicate the reproductive hazard. In addition, "physicians will be supplied with brochures,

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[434] L. Morris, "The FDA's Approach to Patient Package Inserts: The Four Phases of PPI's, "paper presented at International Symposium on Patient Package Insert as a Source of Drug Information, Heymans Institute of Pharmacology, Gent, Belgium (Sept. 26-28, 1988).

[435] *Id.*, p. 7.

[436] *Id.*, p. 8.

checklists, referral telephone numbers, educational materials, and a patient information/consent sheet to help assure that female patients are fully informed . . ."[437]

At this time, the FDA therefore views PPI's as part of a larger program of patient education "involving package solutions, the health professional, and various public communication channels on a case by case basis."[438] In addition, it relies on the practice of many drug firms to voluntarily provide PPI's to physicians for transmittal to patients; has maintained its PPI requirements for oral contraceptives and various hormone-based drugs;[439] and has mandated or recommended PPI preparation and distribution for several other drugs and diagnostic products on a case by case basis.[440]

F. Conclusions

FDA's attempt to establish risk communication between drug firms and patients by enactment of generic PPI requirements encountered formidable problems at every step. It was persistently opposed by drug firms and pharmacists because of the costs it would impose and the liability it would create. It was also opposed by health professionals because it would intrude into the doctor-patient relationship and impose new burdens of unproven value. Evaluations of the untested rule which cast doubt on its efficacy, and political opposition which focused on its efficiency, eventually led the agency to quickly revoke the rule.

The basic premises that patients have a need for drug information, and that government and the private sector should provide it, continue to be recognized by the FDA. Accordingly, the agency is now guiding and evaluating private voluntary initiatives, and dealing with patient information needs on an individual drug basis.

But the multiplicity of private initiatives which are now known to be less effective than the mandatory PPI approach, and the great number of prescription drugs that the agency, under its current policy, must deal with on an individual basis, indicate that revocation of PPI has not led to the more efficacious and efficient system for informing patients about drug use that the agency anticipated.[441] Since any drug risk communication program will have limited effectiveness, the challenge facing the FDA is to now conduct a post-mortem on the post-PPI era and develop a new drug risk communication system that is reasonable, reliable and economically feasible, and to separately deal with its limitations through supplemental methods of public communication and patient education.

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[437] *Id.*, p. 9.

[438] *Id.*

[439] Note 389 *supra*.

[440] For example: radiopharmaceuticals, 10 CFR 33; tests for Hepatitis B, 21 CFR 660.41, 3, 5; tests for bacterial endotoxins, 21 CFR 660.102-104; pin-worm treatment products, 21 CFR 357.152; certain new animal drugs, 21 CFR 510.310; menstrual tampons 21 CFR 801.430f; and in vitro diagnostic products, 21 CFR 809.10

In this regard, a return to a generic, mandatory PPI program now seems warranted, provided it fully incorporates knowledge gained over the last decade. For example, production of PPI's has proven to be less of a problem for industry, private associations, and the FDA than previously anticipated; and like the preparation of material safety data sheets under OSHA's Hazard Communication Standard, presents minor problems which are remediable over time, as experience is gained. Thus, a new generic PPI rule could provide for an industrial responsibility (either individual drug firms or their trade associations) for PPI preparation, and an FDA responsibility for guidance and oversight. The new rule would place reasonable limits on information content, since studies have shown that complexity and length of message can be counterproductive. However, distribution of the PPI's presents a major problem which should be carefully addressed. PPI distribution through the national network of pharmacies has proven persistently difficult to achieve, a problem similar to the failure of many small businesses under the OSHA HCS to distribute MSDS's and train their employees. Therefore, a new PPI rule could address this problem either by providing for stronger enforcement and compliance education programs for pharmacists, or by abandoning pharmacists as the distributors of PPI's to patients in favor of another agent such as the treating physician. The latter option seems to make most sense since it is consistent with the common law duty of the prescribing physician, as the "learned intermediary" between drug firm and patient, to adequately warn the patient of the risks of drug therapy, a duty which is not imposed on pharmacists or drug firms.[442]

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[441] *See* "Combatting Drug Abuse: Prescription Drugs Out of Control," K. Pappas, Governor's Statewide Anti-Crime Council, Commonwealth of Massachusetts(Feb. 10, 1987): "Prescription drug abuse is a silent epidemic" at 1. *Also see Prescribing Practices: Policies and Guidelines*, Mass. Bd. of Registry in Medicine (Aug. 1, 1989).

[442] Under common law, the duty to warn the patient of prescription drug risks is imposed on the physian, but not on the drug manufacturer or the pharmacist, except in relatively rare cases. *See* D. Marschang, D. Reem, "The Continuing Strength of the Learned Intermediary Doctrine," For the Defense (Sept. 1987) 2: "According to the well-established . . . 'learned intermediary doctrine,' prescription drug manufacturers need warn only the prescribing . . . physician of the drug's potential risks, not the ultimate consumer of the drug; i.e., the manufacturer discharges its duty by warning physicians . . . The long-standing rationale behind the learned intermediary rule

By making the physician the PPI distributor, the provision of PPI's to patients would be virtually compelled by the malpractice theory of liability at common law in all states. Consistency of risk communication regulation with common law rights and duties explains a major success of OSHA's HCS--the vigorous efforts of chemical producers to prepare and distribute high quality MSDS's to their downstream customers. The high level of compliance by chemical producers can be attributed to product liability law which requires that they must adequately inform downstream customers and customer employees of product risks in order to discharge their duty to warn product users and therby preclude liability.

Vesting the duty to distribute PPI's in the medical community would enable doctors to more assuredly avoid malpractice liability when prescribing drugs. It would also follow the "regulatory model" favored by Reagan administration officials who opposed the original PPI, in that it would provide the PPI at the time of prescription rather than dispensation. It would further vitiate one of the main arguments against the original PPI, in that it would enable the treating physician to coordinate or reconcile his/her risk communication and advice with that of the PPI, and largely eliminate conflicting messages to the patient.

The remaining issue that would have to be addressed by the FDA relates to the usefulness of the PPI for educating the patient and beneficially altering patient behavior. Evaluations by FDA and by PPI proponents and opponents of the "efficacy" of the original PPI rule employed several criteria which indicate that the analysts know how patients should behave (e.g., return of drugs, report of side effects, etc.) These criteria of PPI efficacy reflect a common problem afflicting regulators and policy analysts, namely, elitism, which makes them view risk communication as a device for changing human behavior. But the main purpose of risk communication is to inform the recipient, so that this person is better-equipped to make personal decisions about risk, and not to guarantee certain behavioral or psychological responses (e.g., whether to take a drug). Nevertheless, where serious side effects or adverse reactions are foreseen as a certainty from misuse or noncompliance,

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holds that the physician, as a learned individual who intervenes between the manufacturer and the consumer, but is able to make an 'informed choice' and tailor the warnings to better suit the particular consumer/patient's needs." Thus, the duty to warn the patient under common law is the responsibility of the prescribing physician, and the proximate cause of a patient's injury.

Also see "Drug Product Liability: Duty to Warn," *U. Pittsburgh L. Rev.*, v 49 (1987) 283. "A physician's duty to warn in prescription drug cases flows from his general duty to inform patients of the risks involved in proposed treatment . . . This duty, [is] known as the doctrine of informed consent." at 290-91. "The overwhelming majority of recent cases have held that pharmacists have no duty to warn consumers of possible adverse reactions inherent in the use of prescription drug under either a negligence or a strict liability theory."at 294.

special measures can be taken by the FDA on an individual drug basis, such as those it has devised for Accutane, to promote desired responses (e.g., avoid use during pregnancy).

Calling for a return to a generic and mandatory PPI rule may be sailing once again into a storm of protest. But all agree that patients need drug information, and evidence now indicates that present voluntary efforts are inadequate and probably very inefficient. A careful reconsideration and reissuance of a generic PPI rule now seems appropriate.

V. Conclusions

The availability of industrial risk information to members of the public is a necessary feature of our democratic society. Without this information, persons are deprived of the ability to take self-protective measures against the latent hazards of products, workplaces and industrial facilities. Without this information, the public is denied the right to participate on an informed and effective basis in decisions which affect their health, environment and well-being.

Thus, many legal doctrines have been developed which guarantee that industrial risk information will be provided to the American public. The Freedom of Information and National Environmental Policy Acts assure public access to industrial risk information held by federal agencies, including information reported by firms to the agencies under various environmental and health protection laws. Duty to warn principles of tort law are now vigorously applied to industry in state courts. Most recently, "right to know" laws and regulations have been enacted to afford public access to additional industrial information on technological hazards, with appropriate accommodation for protection of trade secrets and other legally-protectible interests of private firms.

Despite initial misgivings, larger firms now routinely comply with the disclosure requirements of right to know laws, and trade associations and professional societies have developed principles affirming industrial risk communication. International organizations and other industrial nations are developing similar doctrines. The corporate duty to disclose and the public right of access to industrial risk information are therefore widely accepted and practiced.

But implementation of industrial risk communication programs raises special problems and needs which must be carefully addressed if performance is to measure up to promise. This study has therefore evaluated three federal programs to illuminate the problems and their causes, to define the special needs, and to develop recommendations for improving use of industrial risk communication as an instrument of regulatory policy.

This evaluation has had to contend with several unusual circumstances. For example, the national experience with industrial risk communication in the form of "right to know" programs has been very brief and there is little data on the actual effectiveness of the programs for reducing risk. In addition, each program has been beset by significant uncertainties: whether its true objective is to educate the designated recipients of risk information, or to do more, namely to shape their attitudes and behavior; and whether the program is to serve as a supplement to traditional regulation, or as a "new federalism" or budget deficit-necessitated substitute for more expensive standard-setting.

Nevertheless, the evaluation has led to several findings which can be used to improve the design and administration of existing programs and to guide future use of this policy instrument. These findings are now discussed with reference to the three programs, which have been summarily outlined in the following flowcharts to depict the parties involved and their responsibilities (Figure 1).

A. Program Administration and Compliance

At the core of each risk communication program are important requirements for the production and distribution of risk information materials by designated parties (as depicted in Figure 1). Thus --

- Under HCS, chemical manufacturers must produce MSDS's and labels and provide them to their downstream industrial customers, who must then distribute the materials to workers on request and provide worker training programs;

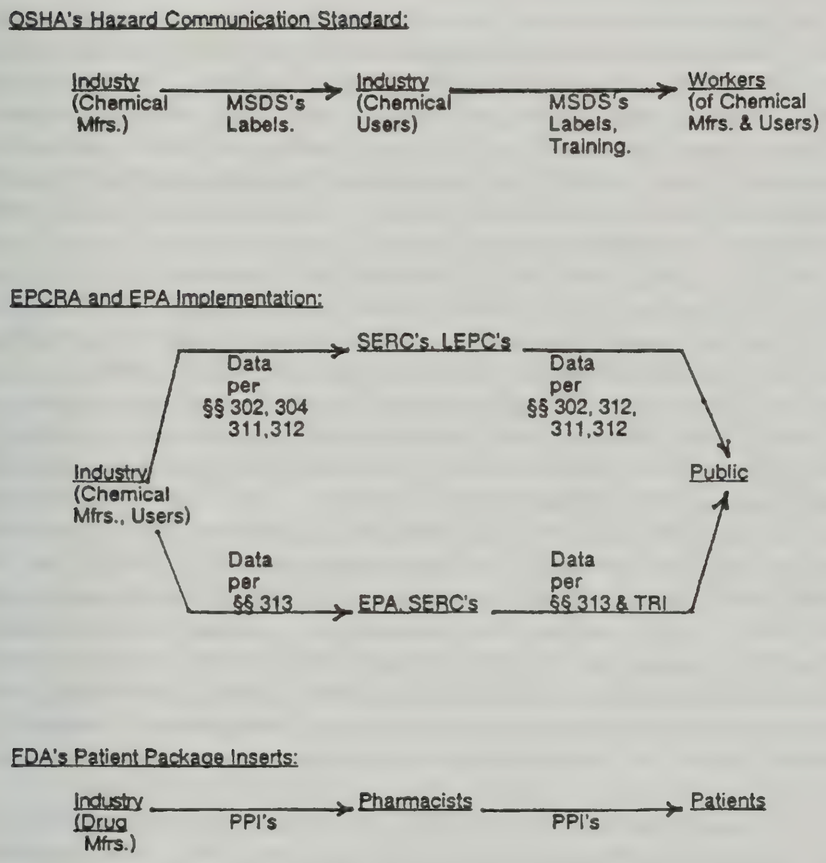
- Under EPCRA, chemical manufacturers and users must produce several reports for SERC's, LEPC's and EPA, who must then distribute the materials to the public on request and develop emergency plans and data inventories for public use;

- Under PPI, drug manufacturer's were required to produce PPI's for ten drugs and provide them to pharmacists, who were required to distribute the PPI's to patients buying the drugs.

Under the HCS and PPI programs, production function requirements were clearly established for chemical and drug manufacturers, respectively. These relatively large firms have adequately complied by producing MSDS's and PPI's.

However, under EPCRA, breakdowns have occurred in the production function. The statute requires chemical manufacturers and a large universe of

Figure 1: Three Federal Programs
for Industrial Risk Communication


OSHA's Hazard Communication Standard:
Industy (Chemical Mfrs.)
MSDS's Labels.
Industry (Chemical Users)
MSDS's Labels, Training.
Workers (of Chemical Mfrs. & Users)
EPCRA and EPA Implementation:
Industry (Chemical Mfrs., Users)
Data per §§ 302, 304 311,312
SERC's, LEPC's
Data per §§ 302, 312, 311,312
Public
Data per §§ 313
EPA, SERC's
Data per §§ 313 & TRI
FDA's Patient Package Inserts:
Industry (Drug Mfrs.)
PPI's
Pharmacists
PPI's
Patients

firms which use chemicals to produce at least five types of reports in accordance with multiple lists of subject chemicals and threshold quantities. Compliance involves considerable expertise in certain instances (e.g., Section 313 Chemical Release Reporting) and requires meeting a veritable calendar of deadlines and responding to continuing modification of the lists by EPA. As a result, many smaller firms, particularly those which are end users of chemicals and who do not consider themselves to be "chemical firms," have not produced the reports and are in noncompliance.

The distribution function has proven to be an even greater problem in that it has broken down in certain respects in each risk communication program. OSHA has found widespread noncompliance by smaller firms with its HCS requirements to provide MSDS's and training to workers. Under EPCRA, EPA has found that many LEPC's and SERC's have failed to develop emergency response plans for public use, and some have inadequately responded to public requests for the industrial information submitted to them. FDA found that pharmacists had persistently low levels of performance when requested or even required to distribute PPI's or similar leaflets to purchasers of prescription drugs, even though all they had to do was store the PPI's they received from manufacturers and dispense them to purchasers.

At least two explanations can be provided for these breakdowns. The first involves conventional reasons for regulatory noncompliance. For example, under both the HCS and EPCRA programs, smaller firms have been found to be insufficiently aware of their production and distribution responsibilities, and lacking in the technical expertise and financial resources needed for compliance. Further, both OSHA and EPA enforcement policies have contributed to the breakdowns. OSHA's HCS is a performance-oriented standard which leaves much of its interpretation to company discretion, but its enforcement policy has used narrow and inflexible criteria for evaluating compliance. EPA, at the other extreme, has generously and repeatedly deferred enforcement until firms are "aware" of EPCRA requirements, thereby inadvertantly justifying their persistent noncompliance. In addition, the agency lacks statutory authority to enforce the development of emergency response plans and the distribution of risk information by SERC's and LEPC's.

But a second explanation may be more useful in several respects. When a risk communication function imposed by federal law, such as production or distribution of information, is not consistent with a duty to warn imposed by common law liability doctrines, the regulatory requirement lacks essential reinforcement and noncompliance is more likely to follow (unless a comprehensive and vigorous agency enforcement program is operative). This rationale, discussed earlier (e.g., Part IV-F of this report) is based on correlations between compliance experience and the applicability of common law liability doctrines.

For example, under the HCS, firms responsible for producing MSDS's have complied because, as chemical manufacturers, they may be liable under products liability law for injuries to users of their products, such as their customer's employees, if they have failed to provide warnings about chemical risks. However, many of these customer firms responsible for distributing MSDS's and providing training to workers have not complied. One reason may be that they are exempt from tort liability for workplace injuries to their own employees arising from lack of warning because worker's compensation law in each state bars employee tort actions against employers. Similarly, under EPCRA, units of government such as SERC's and LEPC's may fail to act and thereby cause injuries to the community with impunity, because they are shielded from tort liability by immunity doctrines in many states. Finally, under PPI, pharmacists are not subject to tort liability for failure to warn customers of drug risks (since physician's have this duty under the common law), and this may account for their failure to distribute PPI's.

The basic "clockwork" of a risk communication program consists of its mechanisms for the production and distribution of information. Brief federal experience with three programs indicates that special attention must be given to the allocation of responsibilities for production and distribution in order to assure that these important mechanisms will function properly. Thus, in the design of a program, responsibilities should be allocated to the fullest extent to those parties already subject to duty to warn doctrines of liability in the common law, in order to capitalize on these doctrines as incentives for the production and distribution of information under the regulatory program.

In subsequent administration of the program by a federal agency, compliance should be sought through parallel programs of regulatory enforcement and technical assistance. The supervisory agency should first establish the credibility and importance of production and distribution responsibilities by making a clear commitment to an enforcement policy, and formulate compliance criteria which are consistent with the discretion given to the parties responsible for production and distribution.

The agency should then develop and use publicity and technical assistance programs to provide guidance to the parties on how to structure their discretion for interpreting and discharging their production and distribution mandates. Publicity and technical assistance should be targeted in particular at those parties with limited resources (e.g., small businesses) in order to lessen their financial and management burdens, and at parties for whom the agency lacks enforcement authority (e.g., state and local units of government). Finally, in developing and applying the technical assistance strategy, the agency should work in collaboration with pertinent industrial and trade associations.

B. Program Efficacy

Risk communication programs, like other regulatory policies, should be effective and achieve their objectives. Therefore, program design and administration should assure that the materials produced and distributed are useful for program purposes. Agencies responsible for program administration should also be provided with sufficient discretion and resources to cure problems and improve the usefulness of the materials.

Assuring the efficacy of any regulatory program requires that its purposes be clearly understood. However, as discussed earlier, the purposes of risk communication programs have been ambiguous. Thus, it is necessary to clarify whether each risk communication program is intended to educate the intended recipients of the information, or to do more, namely, to shape their attitudes and produce certain behavioral outcomes.

Choosing education as the purpose means that the program and its materials should be evaluated by educational criteria: is the information sufficiently clear and understandable to the recipient; objective and reasonably accurate as to what is known; candid as to what is uncertain and what is not known; and truly informative in that it provides what a reasonable recipient would want to know about hazards in an abstract sense and risks in a personal sense. Overall, do the materials and their manner of presentation enable the recipient to more wisely evaluate risks and remedial options? Broad support has been expressed for the proposition that education is the true purpose of risk communication, because it is most consistent with personal freedom and "new federalism" policies, and establishes the necessary social framework for addressing technological advances.[443]

Choosing to do more through risk communication, namely shaping attitudes and behavioral outcomes (as in the PPI program), necessitates the use of advertising and public relations techniques. Many have objected to this role for risk communication as being dishonest, manipulative and authoritorian.[444] Nevertheless, for risks which are significant and imminent, and have irreversible consequences, manipulative communications may be justifiable[445] (as in the Accutane drug case discussed in Part IV).

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[443] *See*, for example, S. Krimsky, A. Plough, *Report to EPA on Improving Risk Communication*, Tufts University (Feb. 1988): "Do not assume that good risk communication correlates directly with change in behavior. The best presentation of risk information will be used differently in diverse socioeconomic contexts. In evaluating most risk communication programs, structure, process and educational outcomes should be emphasized, not behavioral change." at p. 55. *Also see* R. Katz, *Protecting the Consumer Interest*, Ballinger Publ. Co. (1976): "Providing consumers with more information . . . leaves both the number of choices and the quality of the alternatives unchanged. It is therefore the means most compatible with freedom of choice . . . to what extent do we wish to influence, and by what right do we try to change, the values consumers use in making their decisions? Are the sanctity of the environment, the welfare of our fellow citizens, and the rights of future generations more important values than our . . . maximization of individual, short-term self-interest? It is not the American tradition to legislate morality, but perhaps we can try to make consumers . . . more aware of the ethical and social dimensions of consumption activity by providing information . . . at pp. 65, 66.

In light of these considerations, the more widely supported educational purpose of communication should govern any evaluation of program efficacy, and special cases where manipulation of certain outcomes is socially justifiable should be disclosed and dealt with by traditional regulatory means such as standard-setting (e.g., FDA's use of "packaging solutions" to supplement PPI's).

Thus, in evaluating the efficacy of risk communication under the HCS and EPCRA on educational grounds, one must focus on the MSDS's used in both programs to educate workers, community residents and LEPC's, and also address the use of worker training under the HCS and the additional information required by EPCRA.

The MSDS prepared by manufacturers and importers for each of many chemicals is the basic risk communication document under both programs, and must therefore serve multiple purposes in several contexts. Many criticisms of the MSDS have been expressed by workers, unions and employers as being too abstract, technical and uninformative for worker education under the HCS. Parallel criticisms have been expressed by community residents, public interest groups and LEPC's under EPCRA. Specific deficiencies have also been identified including its lack of information about chronic health hazards, its failure to provide comparisons with common risks (e.g., smoking) which would provide "perspective," and its failure to provide useful guidance on safe handling of hazardous chemicals and effective response to chemical accidents.[446]

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[444] H. Otway, B. Wynne, "Risk Communication and the Paradigm of Paradox" (unpublished, 1988): "we should give up notions of 'communication' taken from fields such as advertising... ."

[445] R. Keeny, D. von Winterfeldt, "Improving Risk Communication: Insights from Decision Analysis," paper presented at EPA Workshop on "Risk Perception and Communication," Long Beach, Calif. (1984): "Risk communicators should . . . encourage the public to take personal risk reduction measures . . . they may have to borrow communications strategies and tools from advertising and marketing." at p. 23.

[446] *See* discussion of the importance of communicating risk information to workers on a "need to know" or response promoting basis, "taking into account the level of education, knowledge and training" in order to assure that the information is understood and "action-oriented." For example, European chemical industry officials have suggested use of a series of questions which would clarify what the worker should know, such as "what could happen if . . . ?" L. Jourdan, *Information on Hazards of Substances at the Individual Workplace*, CEFIC,

In addition, since each manufacturer and importer of a subject chemical produces its own MSDS and transmits it downstream in commerce, where it is subsequently distributed to workers, LEPC's, fire departments, and the public, many diverse MSDS's on the same chemical often converge on these designated recipients. Upon receiving diverse MSDS's, for the same chemical, these recipients then have the burden of determining which MSDS's have superior information to rely on for their own needs. This circumstance also indicates that industrial resources are being wasted on duplicative efforts.

Thus, OSHA and EPA, as the supervisory agencies, must work together to cure both types of problems: first to improve the information content and style of the MSDS so that it better serves the educational purposes of both programs, and second, to promote MSDS uniformity and clarity of message either by developing model MSDS's for priority chemicals or by delegating this task to manufacturers or their trade associations (as the FDA intended to do under PPI). Several firms have already acted to voluntarily "improve" their MSDS's beyond current HCS requirements to better educate LEPC's and community residents under EPCRA, and to better warn customers and their employees in order to reduce "downstream" risks and potential liability. These initiatives indicate that industry would cooperate with OSHA and EPA in improving MSDS's.

OSHA and EPA should also jointly address two other issues which impair the efficacy of their programs, but which transcend the content and style of MSDS's. The first of these issues is growing recognition that even the best emergency response plans cannot be put to use with sufficient rapidity by workers and community officials to prevent major harms in many instances (e.g., sudden toxic gas release with rapid dispersion characteristics). One remedy suggested by New York state officials and others has been the identification and mapping of "vulnerable zones" and the development of more stringent accident reduction measures and more rapid emergency response plans for these zones, similar to the flood plain mapping and special standards developed under the National Flood Insurance Program by the Federal Emergency Management Agency (FEMA).

The second issue relates to a serious omission in EPCRA, namely that firefighters and other emergency responders and community residents are endangered by the toxic by-products of nontoxic chemicals (not subject to EPCRA reporting) when these chemicals burn or decompose during a facility accident. (e.g., lethal release of hydrochloric acid when nontoxic polyvinyl chloride burns). This omission should be addressed by both agencies in

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Brussels (1987). *Also see* discussion in M. Baram, *Corporate Risk Management*, note 20 *supra* at pp. 38-40.

collaboration with LEPC's and their fire departments, which are responsible for emergency plans and response actions.

C. Implications for Regulatory Policy

Federal agencies essentially serve as supervisors of the numerous parties responsible for producing, distributing and using risk information. This supervisory role differs in many respects from more familiar regulatory roles in that it requires the agency to 'manage' or orchestrate the designated parties into coordinated compliance. Since agency authority to enforce compliance in risk communication programs is usually limited, and where available, has been shown to be of limited practical value, the supervisory agency must develop other methods of 'managing' coordinated compliance. The most suitable method is the development of partnerships or constructive working relationships with designated parties such as private firms and state and local officials.

The need to develop these constructive working relationships is apparent in the HCS and EPCRA programs. As discussed earlier, EPA and OSHA should work jointly on industrial risk communication, and together work with chemical manufacturers and their trade associations to improve the information content and educational value of the MSDS so that it better serves both programs, and provide regulatory guidance and technical assistance to smaller downstream firms which receive the MSDS's but fail to discharge their duties under the HCS and EPCRA programs.

This collaborative effort can produce a very useful form of 'technology transfer,' useful to both programs, namely the dissemination throughout all 'downstream' industrial sectors of the superior knowledge of chemical risks and safe management methods possessed by 'upstream' chemical manufacturers. Several large manufacturers have already acted voluntarily to transfer this useful information and provide risk management expertise (e.g., safety audits) to their downstream customers. Therefore, the two supervisory agencies should now join and structure these collaborative efforts through formation of a joint OSHA-EPA-Industry Council on Chemical Risk Management which would work on improving MSDS's and fostering technology transfer.

Given the design of the EPCRA program, EPA needs to work in similar close collaboration with state and local officials on their development of emergency response plans, and their use of inspections, safety audits and regulations (e.g., new standards and permit requirements) to prevent accidents in the first instance. EPA's regional offices should be assigned the task of developing relationships with the SERC's and LEPC's in each region on a formal and continuing basis. This would enable the sharing of technical expertise among these government officials, their development of safety audit and inspection programs, and their mapping of vulnerable zones for special attention. Overall, it would motivate the state and local officials to use their considerable state 'police power' authority to regulate safety and prevent accidents at industrial facilities. EPA should also develop public support in each region for SERC and LEPC activities.

Since industrial accident risk factors (e.g., industrial process, chemicals used, facility site, demographics, local response capability, etc.) differ at each facility site and are therefore too diverse for uniform national regulation, this regional approach drawing on state and local authority and public support seems more promising as a means of ultimately reducing facility accident risks and improving community preparedness for emergencies.

EPA must also develop a similar regional collaboration with state air and water quality officials to stimulate actions to reduce the routine release of toxic materials by industry. Toxic Release Inventory (TRI) data on routine releases is now AVAILABLE for regions, states and localities, and can immediately be put to use by state officials to set priorities and to use their considerable authority (under federal Clean Air and Water Acts and state laws) to reduce toxic releases. EPA has recently structured a prototype for such an approach on a national scale to deal with 900 industrial and municipal dischargers of toxic materials nil surface waters under the Clean Water Act, as discussed earlier. This promising start should now be adapted for use on a regional basis, and be used as a model for another set of regional programs to reduce the release of toxic pollutants into the atmosphere, consistent with the Clean Air Act and state air quality law.

In New Jersey, Massachusetts, California and several other states, legislative and regulatory initiatives for the reduction of routine releases have been promoted by public interest groups and are now being implemented. EPA should therefore use its regional offices, TRI data, technical expertise and educational programs to further these state and local initiatives.

The effectiveness of risk communication programs ultimately depends on the ability of the recipients of risk information to understand it and act on the basis of what they have learned. This circumstance creates another major implication for regulatory policy, namely, the need for the supervisory agency to facilitate understanding and responsible action by various sectors of the general public (e.g., workers under HCS, community residents under EPCRA). OSHA and EPA should recognize by now that many persons reviewing MSDS's and EPCRA Reports are confused by the technical information, uncertainties and probabilistic nature of the information in these documents, have developed anxieties about their health status, and are uncertain as to their options for reducing risk.

To meet these special needs, supervisory agencies (e.g., OSHA and EPA) should collaborate with state and local environmental and health officials to provide these public sectors with special services for interpretation of the hazard information disclosed by industry (e.g., the MSDS's and EPCRA reports), and for counseling persons (workers, community residents) on how they should evaluate their risk status and the measures they can take to reduce disease and accident outcomes. State public health agencies and occupational medicine officials should be particularly useful, if mobilized for these purposes.

Another major implication for regulatory policy arises from the condition that risk communication programs must coexist with traditional regulatory programs for standard-setting, but that these distinctly different approaches to risk reduction will often intersect and influence each other.

Thus, supervisory agencies must define this coexistence and address potential intersections so that each approach reinforces, rather than impairs, the other.

For example, risk communication programs may provide industrial data which would support new preventive standards and special monitoring' and reporting requirements, or which indicates that reliance on disclosure alone is inadequate and that prescriptive standards are needed. Conversely, standards alone may prove to be impractical in certain circumstances and require reinforcement in the form of risk communication.

Supervisory agencies such as OSHA and EPA should therefore structure their discretion to address how the coexistence of their risk communication and standard-setting programs should be managed, keeping in mind that risk communication should not serve as a low-cost substitute for traditional standard-setting. For OSHA, this translates into the need to structure a mutually-supportive relationship between the HCS and its standards program for toxic substances in the workplace (as well as its use of the 'general duty clause' and 'emergency temporary standards.') For EPA, the task is to define relationships between the EPCRA program and its regulatory functions under several other statutes which authorize standard-setting to prevent environmental harms (e.g., TSCA, Clean Air and Water Acts).

In some instances, industrial risk communication may generate new perspectives which challenge the agency's basic assumptions and existing approach to regulating chemical risks. These cases which require full scale reconsideration of regulatory programs should be openly deliberated and may require Congressional support in the form of statutory amendments authorizing new regulatory approaches.

For example, OSHA and EPA have acquired sufficient evidence to establish that each hazardous chemical has a commercial life cycle which includes upstream manufacturers and downstream processors, distributors and end user firms; and that the manufacturers in each life cycle usually possess superior KNOWLEDGE of the chemical's hazardous attributes and techniques for safely managing its use.

Given this life cycle perspective and the readiness of manufacturers to use the MSDS and other means to transfer their expertise to downstream firms, OSHA and EPA should now use this knowledge to develop life cycle approaches to the reduction of chemical risks under the OSH Act, TSCA and their other statutes. By taking a holistic view of where a chemical creates risks throughout its commercial life cycle, OSHA and EPA can identify where risk reduction for that chemical is most needed, and work with all firms in the life cycle to transfer superior knowledge from firms which possess it to firms which lack it. Thus, the agencies can stimulate the diffusion of the best methods of corporate risk management throughout the entire life cycle. This approach could be tested first on chlorine, ammonia, and other well-known, high-volume, high-risk chemicals and gradually be extended to lesser-known specialty chemicals, and could provide a useful basis for revising traditional regulatory approaches.

These examples demonstrate that risk communication has several implications for regulatory policy which should be dealt with by supervisory agencies. Therefore, OSHA and EPA should conduct internal studies and subsequently hold public hearings to begin the process of addressing these implications.

D. Transparency and Industrial Democracy

Industrial democracies value technological advance and a citizenry which is capable and active in promoting and protecting its diverse interests. For several decades, the federal government has sought to accommodate both values in its deliberations and decision-making on risk and other determinants of technological advance. When citizen involvement was found to be impaired by lack of information, Freedom of Information and other laws were enacted to provide public access to agency-held information. Thus, citizen capabilities were enhanced by making government activities more transparent.

However, many hazardous technologies continued to be advanced without the awareness or involvement of the public because critical information was held by private firms and remained unavailable to workers, product users and residents of communities hosting industrial activity. Recognition of this circumstance and other factors led to the enactment of new doctrines of industrial risk communication which afford citizen access to certain corporate information on risk. Citizen capabilities were thereby enhanced further by making corporate activities more transparent.

Thus, transparency is now a basic principle for social control of technology in the United States, and holds similar status in the European Community. Transparency empowers the public and enables it to effectively express its diverse interests, thereby providing industrial democracy with the most effective mode of promoting the accountability of government and industrial decision-makers to the full social context in which they operate.[447] But transparency can also produce a spiral of conflicts and adversarial proceedings in agencies and courts. In response to this potential, government and industry are now beginning to recognize the necessity for making changes in their treatment of the risk issues and public concerns which determine technological advance. Probably the most fundamental change is the need to structure truly collaborative relationships in which agencies, industry and the public share information and opinion and jointly resolve technological risk issues.[448]

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[447] M. Baram "Technology Assessment and Social Control," *Science*, v. 180 (May 4, 1973) 465.

[448] *See Communicating with the Public About Major Accident Hazards,* Conference Proceedings, Commission of the European Communities, D.G. XI and JRC Ispra Site (June 1989) for similar views expressed by Conference Director H. Otway, "Risk Communication is not just about the narrow issue of providing accurate technical information, it is about relationships. If we are to enjoy the full benefits of technology wisely selected and applied, new relationships amongst government, industry and society must be established. Communication is the foundation on which these relationships can be built." at 10. Also see, B. Wynne, "Observations of the Conference Rapporteur-General," (unpublished, June 11, 1989): "It is therefore inescapable that once started, risk communication has to face up to change and development in the social relationships between the industry and its community ... In any case, there is now no turning back. Public information, accountability and institutional transparency are a rising tide ... If the public is treated as incapable and immature, the truth of that prejudice is encouraged; and conversely, if they are treated as trustworthy and capable partners, the truth of that more positive faith is encouraged." at 11, 13.

Report for Recommendation 90-4

Report and Recommendations on the Social Security Administration's Administrative Appeals Process

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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I. INTRODUCTION

During the past year, the Social Security Administration has devoted a great deal of its resources to considering possible reforms for its administrative appeals process. Because the vast majority of contested Social Security and Supplemental Security Income benefits claims involve disability-based benefits, the focus of the Administration's efforts in this area has been on disability adjudications.[1] In 1988, the Social Security Administration prepared a staff draft of changes in its administrative appeals process for possible publication as proposed rules.[2] In response to concerns raised about some of the proposals in Congress and elsewhere, the Administration decided to undertake further study of the need for administrative appeals reform before formally publishing proposed rules. As part of this process, the Social Security Administration asked the Administrative Conference of the United States to prepare this report.[3]

The Social Security Administration requested that this report include three substantive topics: a comparative analysis of the administrative appeals process used in a group of federal disability programs, a synthesis of prior recommendations of the Administrative Conference relating to Social Security administrative appeals, and a legal analysis of the provisions of the Administrative Procedure Act and the Social Security Act applicable to Social Security disability appeals. Parts II, III and IV, respectively, of this report cover these three topics. Part V includes a summary of this material and a set of recommendations.

Although the topic of this report is the administrative appeals process, some attention must be paid to procedures used in making initial decisions. Obviously, the quality of initial decisions, including the quality of the evidentiary record developed to support initial decisions, has an important effect on the procedures in place for appealing from initial decisions. In the simplest sense, one can assume that higher quality initial decisions would result in fewer appeals and therefore less pressure on an appellate system that might function quite differently with a significantly reduced caseload. There is also little doubt that poor development of evidentiary records at the initial stages of the process will affect the nature of a subsequent appeal. Thus, it has been found that by far the most important work of lawyers representing Social Security claimants is the compilation and submission of evidence to supplement the limited record typically compiled at the initial decision level.[4] Even if the initial decision process is functioning quite well, the appeals process can be adversely affected by a failure to communicate effectively to claimants the basis for decisions and the underlying facts considered in making that decision. For these reasons, some material relating to the initial decision process is included in this report and addressed in the recommendations.

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[1] Congress has also concentrated its concern with the Social Security program on disability adjudications. *See*, *e.g.*, Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

[2] *See* Department of Health and Human Services, Social Security Administration, draft proposed rules (undated) [hereinafter Social Security Administration Draft Proposed Rules].

[3] The Social Security Administration has also requested the assistance of two other bodies: the Disability Advisory Committee, made up of the former Disability Advisory Council, which has been charged with holding hearings and preparing a report and recommendations; and a panel of experts in the field which will work with the Administration in formulating its recommendations.

II. COMPARATIVE ANALYSIS OF ADMINISTRATIVE APPEALS PROCESS FOR FEDERAL DISABILITY PROGRAMS

In most federal disability programs there are three distinct levels of administrative appeal from an original determination. Although the specific procedures used and the level of formality may differ, a claimant dissatisfied with an original determination can usually seek a review or reconsideration of the original decision still within the agency, followed by an administrative hearing before a hearing officer, administrative law judge or referee, and then a final post-hearing review by a central administrative appeal board. Generally, a claimant must pass through each administrative appeal level as a precondition to the next level of review and must exhaust all levels of administrative appeal in order to seek judicial review, although there are exceptions to this rule in some programs.

The administrative appeals process in place for each of the programs included in this study will be described and analyzed in relation to each other with respect to each of these levels of appeal. Although the appeal process begins only with the filing of an appeal from an agency decision, the process leading to the agency decision and the transmittal of that decision to the claimant can have a significant impact on how the appeals process works. Accordingly, a brief discussion of the process for reaching agency decisions in disability claims precedes the discussion of the three levels of administrative review.

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[4] *See generally* Popkin, *The Effect of Representation in NonAdversary Proceedings - A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1027 (1977). *See also* Dixon, *The Welfare State and Mass Justice: A Warning From the Social Security Disability Program*, 1972 Duke L. J. 681. The percentage of Social Security claimants represented by lawyers has increased dramatically during the past twenty years, particularly at the administrative hearing level. Thus, in 1970, lawyers participated in 20 percent of all hearings; in 1980 lawyers participated in 41 percent; in 1987, they participated in 66 percent. Department of Health and Human Services, Social Security Administration, Report to the Lawyers on Attorney Fees Under Title II of the Social Security Act 13 (1988).

Because this report covers only procedural issues, the comparative material in this section is limited to the administrative appeals process used in various federal disability programs, as opposed to the substantive disability standards that are applied. Although procedure and substance can be separated successfully for most of the purposes of this report, a brief statement of each of the disability standards used in the disability programs discussed in this section will help put the comparative analysis of administrative appeal procedures in context. The key operative element of the Social Security disability standard is the "inability to engage in any substantial gainful activity."[5] The ability to engage in substantial gainful activity is determined in light of the claimant's age, education and prior work experience.[6] Most Railroad Retirement disability claims are governed by a disability standard that is effectively the same as the Social Security standard.[7] Employees, however, are entitled to disability benefits under the Civil Service Retirement Program when they can no longer perform their regular job effectively and cannot be transferred into a vacant comparable position.[8] Veterans disability benefits are awarded under the "compensation" program for total or partial disability caused or aggravated while in active service, based on the effect of the impairment on earning capacity;[9] and under the "pension" program to low-income veterans who are "permanently and totally disabled."[10] Finally, Black Lung disability benefits are provided to miners only if they are totally disabled due to black lung disease caused by coal mine employment.[11]

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[5] 42 U.S.C. §423(d)(1)(A) (1982).This standard applies to Disability Insurance Benefits claims; a substantially identical standard is used for Supplemental Security Income claims. *See id.* §1382c(a)(3)(A).More restricted standards are used for disabled spouses under the Survivors Insurance Program and for children under the Supplemental Security Income program. *See id.* §§423(d)(2), 1382c(a)(3)(A).There are separate, identical regulations for Disability Insurance Benefits and Supplemental Security Income; however, in this report only the Disability Insurance Benefits regulations are cited.

[6] *Id.* §§423(d)(2)(A), 1382c(a)(3)(B).These vocational factors are not included in the disability standard for spouse's Survivors Insurance Benefits or child's Supplemental Security Income.

[7] Although the statutory standard for total disability is phrased somewhat differently, *see* 45 U.S.C. §231a(a)(1)(v), it has been interpreted consistently as identical to the Social Security standard. *See, e.g.*, Estes v. Railroad Retirement Board, 776 F.2d 1436, 1438 (9th Cir. 1985); Duncan v. Railroad Retirement Board, 375 F.2d 915, 917 (4th Cir. 1967). Some claims are decided under a different "occupational disability" standard which is based on the claimant's ability to perform his or her regular, railroad-related occupation. *See* 45 U.S.C. §231a(a)(1)(iv).

[8] *See* 5 U.S.C. §8337(a).

[9] *See* 38 U.S.C. §355.

A few comments about the relative number of disability claims adjudicated in each program are also relevant. At most levels of adjudication, the Social Security and Veterans programs must be separated from the others as involving a much higher number of claims. Thus, there are over 1,000,000 claims per year at the initial decision level in the Social Security and Veterans programs, and less than 10,000 in the Railroad Retirement, Black Lung and Civil Service programs; at the administrative hearing and post-hearing administrative review levels, there are similar order-of-magnitude differences, with over 250,000 Social Security administrative hearings each year and over 50,000 cases at the Appeals Council and Board of Veterans Appeals, compared with, for example, less than 1,000 hearings and less than 100 post-hearing reviews in the Railroad Retirement and Civil Service programs. There are, however, some deviations from this general pattern. Thus, there are considerably less hearings in the Veterans programs compared to the Social Security program, probably because Veterans hearings are optional. Also, there are a relatively high number of hearings and post-hearing reviews in the Black Lung program compared to the number of initial applications--approximately 7,000 hearings and 4,000 cases at the Benefits Review Board each year--because many Black Lung cases are appealed over a long period of time.[12]

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[10] *Id.* §521(a).

[11] *See* 30 U.S.C. §901(a).

[12] This data was compiled from the following (?)Staff of House Comm. on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, 1989 Edition (1989); U.S. Department of Labor, Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1986 (1989); U.S. Merit Systems Protection Board, A Study of Cases Decided by the U.S. Merit Systems Protection Board in Fiscal Year 1987 (1988); Veterans Benefits Administration Hearings Conducted by Hearing Officers--Cumulative Report for FY 1989 (Oct-Mar) (May 1989); Board of Veterans Appeals, Appeals Statistical Data--Board of Veterans Appeals (May 1989); Letter from Leroy Blommaert, Office of Information Resources Management, Railroad Retirement Board (July 3, 1989); Letter from Bonner H. Day, Public Affairs Specialist, Office of Public Affairs, Veterans Administration (June 12, 1989); Letter from Robert H. Kravetz, Director of Administration and Management, Benefits Review Board (July 10, 1989); Internal Memorandum from Dan Peed to Randy Berholtz, U.S. Department of Labor, Division of Coal Mine Workers Compensation (May 4, 1989); telephone interview with Chris Brown, Office of Personnel Management (May 23, 1989).

A. Initial Determination of Disability

Initial disability determinations are made by agency level examiners and, to one degree or another, agency medical staff. A claims file is developed to include relevant medical evidence; claimants are expected to participate in developing relevant evidence and, in many instances, are required to submit to special examinations. Then, an eligibility decision is made by applying the evidence compiled to the applicable disability standard. Claimants are notified of the decision in writing, with some form of explanation of the basis for the decision.

1. Social Security Initial Determination

Initial decisions on Social Security disability claims are made by the Social Security Administration together with state agencies known as Disability Determination Services.[13] The Social Security Administration processes all aspects of the claim unrelated to disability and transmits the formal notice of decision to the claimant. The actual determination of disability is delegated to the Disability Determination Service in the state.[14] The Disability Determination Service is responsible for compiling and developing all medical evidence, evaluating that evidence and reaching a decision as to whether the claimant meets the applicable disability standard.

Disability determinations are made by a disability examiner together with a member of the Service's medical staff, known as a medical consultant. They also decide whether additional evidence is needed and will, in many cases, order a special examination of the claimant by a physician on contract with the agency. A special form, known as a disability transmittal form, is used by the Service to record the disability determination. A brief rationale for the decision, including a statement of the medical evidence relied upon in making the determination, is included as part of that form. The statement of rationale and evidence relied upon is then incorporated in the formal notice of decision issued by the Social Security Administration to the claimant.

2. Initial Determination in Other Programs

Initial decisions in other federal disability programs are made by agency staff, without the use of an outside agency. The Railroad Retirement Board's Bureau of Retirement Claims in Chicago, for example, operates much like a national Disability Determination Service, applying essentially the same criteria as the Social Security Administration.[15] The only difference is that medical consultants participate in the process at the option of the examiner. Similarly, Civil Service disability retirement claims are processed entirely by the Office of Personnel Management.[16] All initial disability determinations are made at the central office in Washington. Claims are evaluated initially by a medical consultant, usually on the basis of evidence supplied by the claimant. The agency can order a medical examination of the claimant, if necessary;[17] however, this authority is used infrequently. The actual disability decision is made by a disability claims examiner, who uses the medical consultant's recommendation and the examiner's own evaluation of the evidence in the file. A written initial decision is then issued by the Office of Personnel Management, which must include findings of fact and relevant conclusions.[18]

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[13] *See generally* 42 U.S.C. §421(a) (Supp. IV 1986); 20 CFR §§404.1601 - .1694 (1988).

[14] The Social Security Administration has the authority to remove this function from a state if the state agency is not performing up to standards. *See* 42 U.S.C. §421(b)(1).

A more elaborate process is used in reaching a final initial determination of eligibility in Black Lung cases than in other programs. Claims are processed by the Division of Coal Mine Workers Compensation of the Department of Labor's Office of Workers Compensation Programs.[19] Disability determinations are made by a deputy commissioner of the Division of Coal Mine Workers Compensation at regional offices throughout the country.[20] The deputy commissioner makes the decision on the basis of evidence supplied by the claimant and the results of a medical examination by an outside medical consultant which is ordered routinely.

The deputy commissioner first makes an "initial finding of eligibility," which, if unfavorable to the claimant, must include a statement of the reasons for the finding and a statement of the additional evidence necessary to establish eligibility.[21] If the deputy commissioner finds that the claimant is eligible for benefits, the process shifts into an adversarial mode in which a "responsible coal mine operator" is identified and given the opportunity to participate in the proceedings.[22] If there is no responsible coal mine operator, then the deputy commissioner will issue a "proposed decision and order" with findings of fact and conclusions of law.[23] If there is a responsible coal mine operator, the operator can participate fully in the proceedings; if the operator is identified only after initial findings are made, the operator can submit its own evidence and request another examination of the claimant before a proposed decision and order is issued.[24] The proposed decision and order is the final determination by the deputy commissioner unless objected to or unless the claim is submitted by the deputy commissioner for a hearing before issuing a proposed decision and order.[25] The deputy commissioner can also hold a conference with all the parties and attempt to resolve or limit issues before issuing a proposed decision and order.[26]

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[15] For most purposes, the Railroad Retirement disability standard is identical to the Social Security standard. *See* note 7, *supra*, and accompanying text.

[16] *See generally* 5 U.S.C. §8337 (1982); 5 CFR §831.501 (1988). Prior to January, 1979, the program was administered by the Civil Service Commission. Claims are processed first at a central facility for purposes of evaluating eligibility criteria unrelated to disability. *See id.* §§831.102, .104, .501(c).

[17] *See id.* §831.502(b).

[18] *See* 5 CFR §831.1205(b).

[19] *See generally* 30 U.S.C. §§901-950 (1982 and Supp. IV 1986); 20 CFR §725.304(b) (1988).

[20] *Id.*

[21] 20 CFR §725.410(c) (1988).

Veterans disability benefits are processed initially at local offices of the Department of Veterans Affairs by the Compensation and Pension Service in the Veterans Benefits Administration.[27] Preliminary evaluation of a claim, particularly with respect to issues unrelated to disability, is done by an "authorization unit." The responsibility for determining disability, including most of the responsibility for developing medical evidence, lies with the Rating Board, a panel of three people, one of whom is a medical doctor.[28] The Board can request additional medical information and order special examinations, usually from medical staff at Veterans Administration medical facilities.

Rating decisions are prepared by the members of the Board, and signed by all three members before they are returned to the authorization unit for implementation. There are specific guidelines for Rating Board decisions, which must include a listing of any combat disabilities, a finding of employability, if relevant to the determination, and a "narrative."[29] The narrative must include a statement of the issues involved in the claim, a recitation of all facts relevant to the determination of the claim, and a discussion of the reasons for the conclusion reached.[30] The claimant is notified of the decision by the authorization unit through a Notice of Decision which states the reason for the decision, including the rating decision if one was made.[31]

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[22] *Id.* §§725.410(b), (c) (2). A responsible coal mine operator, which may or may not exist with respect to a particular claim, is a coal mine operator given responsibility for payment of the claimant's benefits by virtue of the claimant having worked at the operator's coal mine under circumstances outlined in the Black Lung Benefits Act. *See* 30 U.S.C. §802(d) (1982); 20 CFR §725.492, .493 (1988).

[23] *See* 20 CFR §725.418.

[24] *See id.* §725.414.

[25] *See id.* §725.415. Objections to a proposed decision and order are discussed at text accompanying notes 51-53, *infra*. Direct referrals for hearing by the deputy commissioner are rare.

[26] *Id.* §§725.416-.417.

[27] *See* 38 CFR §3.100 (1988).

[28] *See* Veterans Administration Manual M21-1 §45.01(b).

[29] *Id.* §§49.11, .12, .17.

B. Administrative Review Prior to Hearing

All programs provide claimants with an opportunity to request a review of an initial determination on a disability claim at the agency level, before requesting an administrative hearing. In some programs a request for an agency review of the determination is a precondition to a request for an administrative hearing. In other programs, a second administrative review is available at the option of the claimant.

1. Social Security Reconsideration

The Social Security Administration's reconsideration procedure is a good example of a formal administrative review which a claimant must pursue prior to requesting a hearing.[32] A request for reconsideration, which must be filed within 60 days of receipt of notice of a decision,[33] triggers a reexamination of all of the evidence in the file as well as additional information submitted by the claimant with the request. As with initial decisions, a reconsideration request is reviewed initially at the local Social Security Administration office, and then forwarded to the Disability Determination Service when the contested issue is disability.

The reconsideration process begins with an effort to include in the reconsideration file all current medical information and an explanation of why the claimant disagrees with the initial determination. Then, if it appears that the medical record is insufficient or contains conflicting evidence, new medical information is obtained either from existing sources or by ordering new consultative examinations.[34] A reconsideration decision is then made by a disability examiner and a medical consultant who were not involved in the initial determination. The same standards are used as those that apply to the initial determination, and the notification process following reconsideration is the same as with an initial decision.

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[30] *Id.* §49.17(g). As stated in the Manual, "[t]his discussion and reasoning is what the Board adds to the evidence. Whatever is necessary to justify the conclusions should be cited." *Id.*

[31] *See* 38 CFR §3.103.

[32] There is no "reconsideration" of a decision granting benefits; however, there are separate internal quality control procedures for monitoring and reviewing decisions generally.

[33] *See* 20 CFR §404.909(a) (1988). There are rules for extension of the period within which reconsideration can be requested upon a showing of "good cause." *Id.* §404.911.

A modified reconsideration procedure is used when the "initial decision" is to terminate benefits following a "continuing disability review" in which the Social Security Administration found, on the basis of medical evidence, that the claimant's disability ceased.[35] As the result of controversy surrounding the procedures used to effectuate continuing disability reviews in the early 1980s, Congress required the Social Security Administration to provide for some form of hearing as part of the reconsideration process in those cases.[36] Reconsiderations in continuing disability review cases are conducted by special "CDR examiners" according to essentially the same procedures as regular reconsiderations.[37] However, if the termination is upheld, the claimant is given the opportunity to request a "disability hearing" before the reconsideration decision is final.[38] These hearings are held at the Disability Determination Services by special hearing officers, who reevaluate the claim based on the evidence in the record and any testimony presented at the hearing. Claimants can be represented, and can present their own testimony as well as testimony of witnesses.[39] The hearing officer then makes a determination on disability, which becomes the final reconsideration decision on the claim.[40]

2. Reconsideration or Agency Review in Other Programs

Reconsideration procedures for Railroad Retirement disability claims are the same as those used for Social Security claims, except that there are no continuing disability reviews in that program and therefore there are no special disability termination hearings.[41] A similar but more limited procedure is used for reconsideration of initial decisions by the Office of Personnel Management in Civil Service disability claims. A claimant must request reconsideration in writing within 30 days after receipt of the initial decision.[42] An appeal to the Merit Systems Protection Board for a hearing can be made only following a final decision on reconsideration.[43] The main difference is that reconsideration review is based only on the record compiled on the initial application; there are no provisions for developing further evidence at this stage in the process. There must be a written decision on reconsideration which includes a full statement of relevant findings and conclusions.[44]

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[34] *See generally* POMS §DI3201.B; 20 CFR §404.913(a).

[35] *See* 20 CFR §404.913(b). A finding that a claimant is no longer disabled can be based on nonmedical factors, such as a return to work. *See id.* §404.1594(f)(1).

[36] *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). *See also* 48 Fed. Reg. 36,831 (1983); 20 CFR §§404.913(b), .914-.918.

[37] "CDR examiners" are experienced disability examiners trained specially to review continuing disability review claims.

[38] *See* 20 CFR §404.913(b).

[39] *See id.* §§404.916(b).

[40] *Id.* §404.917(d).

[41] As with Social Security claims, reconsideration is a precondition to requesting an administrative hearing. *See* 20 CFR §404.930.

A request for reconsideration in a Veterans disability claim is processed much like a Social Security reconsideration request, except that the review is less formal and claimants have the option to seek agency level review of an initial decision or to proceed directly to a hearing.[45] A claimant is expected to furnish additional evidence, if relevant, and indicate errors of fact or law in the original notice of decision. This material is reviewed by the authorization unit, and then referred to the Rating Board "[i]f there is any question as to the probative value of medical evidence or whether consideration by the Rating Board is warranted."[46] Otherwise, the reconsideration is completed by the authorization unit. If the claim is referred to the Rating Board, it proceeds with the reconsideration decision in the same manner as an initial decision; if referral to the Rating Board is considered unnecessary, the reconsideration request is denied by the authorization unit. If reconsideration is denied, the notice is to include a full explanation of the reasons.[47] A decision denying reconsideration can then be appealed in the same manner as an initial decision.[48]

Veterans Benefits Administration procedures also allow claimants to request that their claims be reopened after the time to appeal has expired. In effect, this allows claims to be refiled on the same basis as an earlier application but supported with new facts.[49] When new facts are alleged supporting an earlier claim it is adjudicated without regard to the prior decision on the issue of disability. Even if the claim is reopened on the basis of the same facts, benefits can be awarded if there has been a change in the law or, under limited circumstances, as an "equitable entitlement."[50]

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[42] 5 CFR §831.109(d) (1988). The time limit may be extended under limited circumstances. See id. §831.109(e)(2).

[43] *Id.* §831.110.

[44] *Id.* §831.109(f).

[45] In both programs a request for reconsideration can be made up to the time for requesting an appeal. For Veterans Disability Benefits the period is one year, 38 CFR §19.129 (1988); for Black Lung Benefits the time period is 60 days, 20 CFR §725.410(c)(2) (1988).

[46] *See* Veterans Benefits Administration Manual M21-1 §27.02(a).

[47] *Id.* §27.04. The actual quality of many notices is, however, quite poor. The U.S. General Accounting Office is conducting a study which includes the quality of Veterans Benefits Administration disability notices.

[48] *Id. See also* 38 CFR §3.103.

The reconsideration procedures discussed so far are, in effect, opportunities for an appeal from a final, initial decision. The decision process at the agency level is thus broken into two distinct parts: The initial decision following procedures for developing and evaluating relevant evidence, and a reassessment of the initial decision followed by a review of that decision and promulgation of a new decision. In the Civil Service program, the review is based on the existing record; in other programs, the existing record is evaluated for completeness and, if necessary, supplemented.

An entirely different approach to administrative review prior to hearing is followed in the Black Lung program. Rather than provide for an intermediate, limited agency-level appeal, the process in the Black Lung program is more like an optional extension of the initial decision process. The notice of an initial decision in a Black Lung claim includes a statement of additional evidence that would be necessary to establish eligibility.[51] The claimant then has 60 days within which new evidence can be submitted or a hearing can be requested.[52] If the claimant does not want to submit new evidence to the deputy commissioner, then there is no further review at that level; the only option then is to request a hearing. If new evidence is submitted, a new decision is made by the deputy commissioner on the basis of the entire record, including the new evidence.[53] As with initial decisions, if a new finding is made that the claimant is eligible and if a responsible coal mine operator is identified, the operator is given the opportunity to submit its own evidence, request a new medical examination and request a new decision on eligibility.[54] When a responsible operator is involved, the deputy commissioner can schedule a conference with the parties in order to resolve or limit the issues before issuing a proposed decision.[55]

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[49] *See generally id.* §3.160(e).

[50] *See* 38 U.S.C. §210(c)(2), (3)(A) (Supp. IV 1986). Equitable entitlement is authorized only when the denial was due to administrative error or if the claimant relied on an improper grant and suffered a loss on that basis without knowing the original grant was improper. *Id.*

[51] 20 CFR §725.410(c) (1988). *See also* text accompanying note 21, *supra*.

[52] *Id.*

[53] If the claim is denied again, a request for a hearing can still be filed within 60 days following the second denial. 20 CFR §725.410(c)(2).

[54] *See id.* §725.414.

[55] *Id.* §725.415.

The deputy commissioner then issues a proposed decision and order which contains findings of fact and conclusions of law.[56] The parties may then respond by requesting a revision of the decision or by requesting a hearing within 30 days. A request for a revision must "specify the findings and conclusions with which the responding party disagrees."[57] The deputy commissioner, in acting on a request to revise a proposed decision and order, may simply deny the request, amend the decision and order, or "take such other action as is appropriate," including the development of additional evidence.[58] The deputy commissioner's revised decision and order or the refusal of the deputy commissioner to revise the proposed decision and order may be appealed through a request for a hearing.[59]

C. Administrative Hearings

The administrative hearing is the most important element of the administrative appeals process for all the programs included in this study. The general model is to set the hearing level apart as a separate opportunity for a *de novo* review of prior agency action on an application for benefits. Thus, at the Social Security Administration, the Railroad Retirement Board and the Department of Labor, claims are transferred to separate offices--the Social Security Administration's Office of Hearing and Appeals, the Railroad Retirement Board's Bureau of Hearings and Appeals, and the Department of Labor's Office of Administrative Law Judges--for hearing, and Civil Service disability retirement claims are transferred for hearing from the Office of Personnel Management to the Merit Systems Protection Board. The Veterans Benefits Administration handles appeals somewhat differently, although recently it also has moved toward separating the administrative hearing procedure from the rest of the agency-level decisionmaking process.

1. Social Security Hearings

Social Security claimants may request a hearing before an administrative law judge within 60 days following receipt of a decision on a request for reconsideration. The hearing request is submitted on a standard form which requires only a general statement of the basis for the appeal.[60] The entire record is transferred from the local district office to the local office of the Office of Hearings and Appeals. Cases are then usually assigned to a particular administrative law judge. At this point the file is reviewed by a hearing assistant who selects essential documents for inclusion in the appeals file[61] and assesses the evidence in order to determine whether additional factual development is needed. Development of additional evidence relating to disability includes obtaining existing records from treating sources or hospitals, soliciting written reports from treating sources with respect to the claimants' disabilities, and ordering special medical examinations by consulting physicians chosen from a panel provided by the Disability Determination Services. The extent and nature of factual development at the Office of Hearings and Appeals varies widely from office to office and from judge to judge. Claimants are also notified that they may submit additional medical evidence on their own.[62]

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[56] *Id.* §725.418(b).

[57] *Id.* §725.419(a), (b).

[58] *Id.* §725.419(c).

[59] *Id.*

The general pattern is for the administrative law judge and his or her staff to review and develop evidence independently, without communicating or coordinating with the claimant and the claimant's representative. Social Security Administration regulations provide that the administrative law judge may hold a prehearing conference in order to focus the issues to be considered at the hearing and to identify necessary factual development.[63] In addition, administrative law judges have the authority to subpoena witnesses, either on their own or on behalf of a claimant.[64] In practice, however, the prehearing procedures and the subpoena power are used rarely.

Social Security administrative hearings are nonadversarial and the Social Security Administration is not represented.[65] The administrative law judge engages in a *de novo* review of the claim based on all of the evidence in the record, including testimony presented at the hearing.[66] The administrative law judge is required to examine all of the issues raised by the claimant fully and to receive into evidence all relevant documents and testimony.[67] Moreover, the judge is charged with the responsibility for assuring that all evidence necessary to resolve the claim is included in the record, particularly when the claimant is unrepresented.[68] The judge has an affirmative responsibility in this regard; he or she "acts as an examiner charged with developing the facts."[69] The nonadversarial nature of the proceeding places a basic duty of inquiry on the administrative law judge "to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts."[70]

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[60] The form currently in use, Form HA-501-U5, states on behalf of the claimant that he or she disagrees with the determination, and then provides two blank lines following the statement, "My reasons for disagreement are:"

[61] Material from the original file not included in the appeal file is kept in a separate file known as a "junk" file.

[62] Thus, the form on which a hearing is requested includes a box to check if additional evidence will be submitted, as well as a box to check if the claimant has no additional evidence to submit.

[63] *See* 20 CFR §404.961 (1988).

[64] Claimants must request a subpoena from the judge in advance. *See id.* §404.950(d).

[65] *See id.* §404.900(b); Ware v. Schweiker, 651 F.2d 408, 413 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982). The Administration ran a demonstration project in the mid-1980s known as the "Government Representative Experiment" in which it was represented at hearings where the claimant was represented, but it was not implemented systemwide. *See* 47 Fed. Reg. 36,117 (1982).

The administrative hearing itself is extremely important to claimants, for it is the one opportunity they have to appear personally to present their claim before a decisionmaker who has access to the complete record in the case. Although claimants are entitled to appear and testify at the hearing,[71] an administrative law judge may issue a decision wholly favorable to the claimant without a hearing.[72] The administrative law judge's responsibility to develop issues fully includes the responsibility to assure that witnesses are questioned properly. Problems occur in this regard most frequently with vocational experts; the administrative law judge must make sure that hypothetical questions based on all of the claimant's medical conditions have been asked and that opinions are not given based on facts unsupported by the record.[73]

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[66] *See* 20 CFR §404.953(a). The process is informal; however, witnesses testify under oath and a full transcript of the hearing is made. *Id.* §§404.950(e), .951.

[67] *Id.* §404.944.

[68] *See generally* Bloch, *Representation and Advocacy at Nonadversary Hearings: The Need for Nonadversary Representatives at Social Security Disability Hearings*, 59 Wash. U. L. Q. 349 (1981). *See also* Smith v. Bowen, 687 F.Supp. 902, 906 (S.D. N.Y. 1988) ("The administrative law judge's duty to develop the comprehensive record . . . is greatest when claimant is unrepresented; but the duty still exists when the plaintiff is represented").

[69] Richardson v. Perales, 402 U.S. 389, 410 (1971). *See also* Echevarria v. Secretary, 685 F.2d 751, 755 (2d Cir. 1982) ("the ALJ, unlike a judge in a trial, must himself affirmatively develop the record"); Poulin v. Bolin, 817 F.2d 865, 870-71 (D.C. Cir. 1987) ("administrative law judge has affirmative duty to . . . develop the comprehensive record requisite for a fair determination of disability)".

[70] Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987), *citing* Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring).

[71] 20 CFR §404.929. Claimants can waive this right, but the waiver must be made knowingly and intelligently. *See, e.g.*, Thomas v. Schweiker, 557 F.Supp. 580, 582 (S.D. Ohio, 1983). "However, a personal appearance is considered to be of sufficient importance that an administrative law judge can insist upon a claimant being present even when there has been a prior valid waiver." Stoner v. Secretary of Health and Human Services, 837 F.2d 759, 761 (6th Cir. 1988) (citing 20 CFR §404.950(b)). Further, counsel cannot waive the right to appearance unless given the authority by the claimant. *Id.*

[72] 20 CFR §404.948(a).

Administrative law judges also have the authority to call a medical expert, often referred to as a "medical advisor," at the hearing.[74] Some judges do this frequently, others infrequently, and many not at all. When medical advisors are called to testify, they are to do so as neutral experts subject to cross examination.[75] Similarly, administrative law judges must assure that other witnesses, including the claimant, are questioned so that their testimony is presented effectively.[76]

Consistent with the informal nature of the Social Security Administration's administrative hearing procedures, "[i]n making a decision [the Administration] will consider all information [it] gets from [the claimant] and others about [the claimant's] impairments."[77] There are no formal requirements for the presentation of evidence and the formal rules of evidence do not apply.[78] Thus, written reports from witnesses, including medical experts, are accepted into the record without technical objection.[79] Documentary evidence is accepted from the claimant at the hearing and, at the option of the administrative law judge, after the hearing within a limited period of time set by the judge. In some instances the administrative law judge will order additional medical evidence after the hearing; if this is done, the claimant must be given the opportunity to rebut or respond to that evidence before the record is closed for decision.[80]

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[73] *See, e.g.*, Embrey v. Bowen, 849 F.2d 418 (9th Cir. 1988) (hypothetical that is not supported by the record and is flatly contradicted by claimant and claimant's physician "has no evidentiary value and cannot support the [administrative law judge's] decision"). *See also* Brenem v. Harris, 621 F.2d 688, 689-90 (5th Cir. 1980).

[74] *See* Pugh v. Bowen, 870 F.2d 1271, 1278 n.9 (7th Cir. 1989) ("In cases where it is not possible to infer [the proper determination from] . . . the medical evidence . . . the administrative law judge should call on the services of a medical advisor").

[75] *See, e.g.*, 870 F.2d 742, 744 (1st Cir. 1989) (medical advisor's testimony accepted because, among other reasons, he was subject to a cross-examination).

[76] *See, e.g.*, Quiles v. Califano, 460 F.Supp. 110, 112 (E.D. Wis. 1978).

[77] 20 CFR §404.1512(a).

[78] *See id* §404.950(c). *See also* Sherill v. Bowen, 835 F.2d 166, 169 (8th Cir. 1987) (as long as the evidence is material to the issues in question, it may be considered by the administrative law judge, even if inadmissible under the rules of evidence in a court of law).

[79] *See* Richardson v. Perales, 402 U.S. at 402 (1971).

[80] Thus, an administrative law judge cannot rely on a medical report received after the hearing without giving the claimant an opportunity to rebut that evidence. *See, e.g.*, Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983). *See also* Wallace v. Bowen, 855 F.2d 101, 108 (3d Cir. 1988) (When the administrative law judge chooses to allow evidence after the hearing, he or she must "afford the claimant not only an opportunity to comment and present evidence but

Following the closing of the record, the administrative law judge makes his or her decision on the merits. The decision must be communicated to the claimant in writing with a full statement of findings of fact and reasons for the decision.[81] Judges are required to include specific findings on weight given to conflicting evidence and on the credibility of witnesses.[82] The decision "must let the parties and the reviewing courts know, in some intelligible fashion, where they stand on the pivotal issues of fact posed by the applications they adjudicate."[83]

2. Hearings in Other Programs

Procedures for initiating an administrative hearing tend to be more extensive in other programs. Although the role of the administrative hearing in the administrative appeals process is essentially the same in all programs, except, to some extent, in the Veterans program, there are significant differences in the manner in which hearings are held. In the Civil Service and Black Lung Programs, where, as in the Social Security program, administrative hearings are *de novo* reviews of final agency decisions, the process is somewhat more formal. In both of these programs this could result from the fact that administrative hearing decisions are subject to significant further administrative review.[84] In the case of the Black Lung program, the hearing process is a great deal more complex in part because hearings are adversarial.[85] Veterans hearings can serve slightly different functions from those in other programs, and are also subject to a more comprehensive final

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also an opportunity to cross-examine the authors of any post-hearing reports, and must reopen the hearing for that purpose if requested").

[81] 20 CFR §404.953(a). *See also* Burnett v. Bowen, 830 F.2d 731, 736 (7th Cir. 1987) ("[the administrative law judge's] failure to comment on the appellant's evidence leaves this court with a record insufficient for a meaningful appellate review . . . [To] ensure meaningful review at least a minimum level of articulation of the [administrative law judge's] assessment of the evidence is required").

[82] Making credibility determinations "is a difficult job, and . . . errors are obviously difficult for the reviewing court to detect . . [thus a reviewing court] will not normally substitute [its] impressions on the veracity of a witness for those of the trier of fact." Gooch v. Secretary, 833 F.2d 589, 592 (6th Cir. 1987).

[83] Chiappa v. Secretary, 497 F.Supp. 356, 358 (S.D.N.Y. 1980). Although the administrative law judge decides the claim, the decision itself is usually written by staff attorneys rather than the judge.

[84] *See* text accompanying notes 183-241, *infra*.

[85] Civil Service disability hearings can be described as somewhat adversarial. *See* text accompanying notes 102-104, *infra*.

administrative review procedure.[86] The Railroad Retirement program, on the other hand, follows essentially the same procedures used in Social Security hearings, except that referees are used rather than administrative law judges and they never call medical experts to testify.[87]

The process begins in Civil Service disability retirement claims with a filing of a petition for appeal with the Merit Systems Protection Board.[88] The claimant has the option of requesting a hearing as part of the appeal; if a hearing is not requested the appeal will be decided solely on the documentary evidence in the record.[89] Although the Board's regulations require that a claimant include a statement of the basis of the appeal, under most circumstances failure to do so can be remedied later in the proceedings.[90]

Unlike with Social Security appeals, the Office of Personnel Management is required to respond to a petition for appeal.[91] The Office's response must include "[a] specific response admitting, denying or explaining, in whole or in part, each allegation of the appellant's petition" as well as copies of all documents in the record.[92] In practice, the Office's responses are often minimal. Thus, the Office was found to have "substantially complied" with Board regulations when it submitted a case file and copy of the reconsideration decision as a response to a petition for appeal.[93] The Office may request a hearing in its response; however, it is not entitled to a hearing as a matter of right and therefore must provide a statement of reasons for the request.[94]

Appeals are held before administrative judges who conduct a *de novo* review of the record.[95] New and supplemental evidence may be submitted at the hearing; however, the judge will not consider proof of an entirely new basis for disability.[96] If evidence of a new condition is presented, the proper disposition is to deny the claim and await the filing of a new application based on the new condition.[97] Board procedures are designed to cover the full range of personnel issues it considers in addition to claims for retirement benefits. Thus, its procedures on fact development are similar to those available in general civil litigation.[98] Although most disability retirement cases do not require extensive use of these rules, the Office has been ordered to respond to interrogatories requesting a statement of the standards used to deny a claimant's application for benefits.[99] The Board also has authority to issue subpoenas based on a general showing of relevance and materiality, and the reasonableness of the scope of the request.[100] The technical rules of evidence do not apply; however, objections can be made on the grounds of relevance and materiality.[101]

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[86] Some Veterans benefits hearings are held before a final agency level decision is made. *See* text accompanying notes 142-44, *infra*.

[87] *See generally* 20 CFR §§260.5 (1988).

[88] 5 CFR §1201.22(a) (1988). The appeal must be filed within 20 days after the date of the Office's final decision. *Id.* §1201.22(b).

[89] *Id.* §1201.24(e). *See* Sweat v. Office of Personnel Management, 40 M.S.P.R. 84, 89 (1989) ("Applicant's right to a hearing on appeal may only be waived by implication if there is a clear, unequivocal and decisive act showing such a purpose"). *See also* Beaudette v. Department of the Navy, 5 M.S.P.R. 394 (1981).

[90] *See* 5 CFR §1201.24(b) ("[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or substantially delay the proceedings").

[91] *Id.* §1201.22(b). The Board serves a copy of the petition on the Office; and the Office has 15 days to respond. *Id.* §1201.26(c).

[92] *Id.* §1201.25(a)(3), .25(a)(4).

[93] *See* Miller v. Office of Personnel Management, 7 M.S.P.R. 469, 473 (1981).

[94] 5 CFR §1201.25(b).

[95] *See* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986) ("In adjudicating disability retirement appeal, the Board is not limited to review of record before [the

Board procedures also contemplate that hearings before administrative judges will be adversarial. As noted earlier, the Office is expected to file its response to a claimant's petition for appeal. In addition, the Office must designate a representative to sign its response;[102] however, in most cases the Office is not represented at the hearing itself. Indeed, the Office has been criticized for its limited participation in defense of its disability retirement decisions before the Board.[103] Although the Office often does not appear at

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Office of Personnel Management], but is mandated to conduct a hearing if requested by appellant and to consider *de novo* all relevant evidence presented by both parties.") *See also* French v. Office of Personnel Management, 30 M.S.P.R. 503, 505 (1986).

[96] *See* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 413, n.14 (1981) ("we do not consider . . . evidence relating to a totally different or additional medical condition which was never the subject of an appellant's application to OPM"). Thus, in Bilancia v. Office of Personnel Management, 8 M.S.P.R. 77, 78-79 (1981), the Board refused to consider a disability claim based on anxiety and depression when initially only physical grounds were presented as a basis for the application.

[97] Nulph v. Office of Personnel Management, 29 M.S.P.R. 79, 80-81 (1985).

[98] For example, the Board has a set of discovery rules based on the Federal Rules of Civil Procedure. *See generally*, 5 CFR §§1201.71-.75. These discovery provisions are construed liberally by the Board. *See*, *e.g.*, Johnson v. Dept. of the Treasury, 8 M.S.P.R. 170, 174 (1981) (all evidence that "assists in planning a case" is discoverable).

[99] *See* Julson v. Office of Personnel Management, 8 M.S.P.R. 178, 182-83 (1981).

[100] *See generally* 5 CFR §§1201.81-.85. Subpoena requests are ruled upon by the administrative judge. *Id.* §1201.81(c).

[101] *See generally*, 5 CFR §1201.62.

[102] *Id.* §1201.25(a)(5).

[103] *See* U.S. General Accounting Office, Most Civil Service Disability Retirement Claims Are Decided Fairly, But Improvements Can Be Made (1983).

hearings, it will appear when an administrative judge holds a prehearing conference. In the past few years, administrative judges have been making greater use of the prehearing conference in order to limit the issues on the appeal and, in some cases, to resolve the matter without a hearing.[104]

Hearings are held at various sites throughout the country.[105] The administrative judge must consider all evidence that is relevant and material, unless "unduly repetitious."[106] Thus, disability retirement decisions "must be based on the probative value of all the evidence, taking into account objective clinical findings, diagnoses and expert medical opinions, subjective evidence of pain and disability, and all evidence relating to the effect of the applicant's condition on his or her ability to perform in the grade or class of position last occupied."[107] The judge's role at the hearing is more limited than that of the administrative law judge at Social Security hearings. Thus, although the administrative judge is under a similar duty to decide all issues presented by the parties and not to dismiss an appeal because there is insufficient proof, the judge's obligation is to request the party to submit additional necessary evidence.[108] The parties are given time to file written arguments and to submit additional evidence identified at the hearing.[109] The administrative judge must then issue a written initial decision within 25 days after closing the record, which must include the disposition of the claim and specific findings of fact and conclusions, as well as reasons and bases for those findings and conclusions with respect to all material issues of fact and law presented by the record.[110] This requirement has been construed strictly by the Board in order to provide it with the information necessary to review the administrative judge's decision effectively.[111]

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[104] *See generally* 5 CFR §1201.41(b)(12), .41(c)(1). *See also* D'Iorio v. Department of Housing and Urban Development, 34 M.S.P.R. 351, 354 (1987) ("The administrative judge acted fully within her authority in directing the parties to stipulate to facts not in dispute. [She] has the authority to 'hold prehearing conferences for the settlement and simplification of issues' . . . similar to the power a federal judge has . . . to order a pretrial conference").

[105] There is a list of 109 sites for hearings in the Board's 11 regions; in addition, a hearing can be held elsewhere "if good and sufficient reason is shown." *See* 5 CFR §1201.4(e), Appendix II and III to part 1201.

[106] 5 CFR §1201.62(a). *See* Bommer v. Department of Navy, 34 M.S.P.R. 543, 551 (1987) ("If all of the proffered evidence and testimony concerns only undisputed or otherwise immaterial matters, the administrative judge has the authority to exclude all of it").

[107] Livingstone v. Office of Personnel Management, 30 M.S.P.R. 335, 338 (1986) (*quoting* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 423 (1981)).

[108] *See* 5 CFR §1201.41(b)(10). *See* Juve v. Office of Personnel Management, 33 M.S.P.R. 17, 20 (1987) ("the administrative judge should have directed [the Office of Personnel Management] to provide explanatory material to enable him to make the required finding of fact"). *See also* Mascol v. Dept. of Navy, 7 M.S.P.R. 565, 567 (1981). The judge has a similar obligation in cases submitted without a hearing. Rosenberg v. Commodity Futures Trading Commission, 7 M.S.P.R. 664, 666 (1981).

[109] 5 CFR §1201.57. A closing date is set by the administrative judge also if no hearing is held. *Id.* §1201.58(b).

Administrative hearings in Black Lung disability cases are fully adversarial.[112] They are held either upon direct referral by the deputy commissioner adjudicating the claim or, following a decision by the deputy commissioner, upon request by any party to the claim.[113] A hearing request must be made in writing, and must include the contested issue of fact or law.[114] When a claim has been filed, all relevant material from the claims file is forwarded to the Department of Labor's Office of Administrative Law Judges.[115] Although there is a set of general rules of practice and procedure for administrative hearings conducted by the Office of Administrative Law Judges,[116] there are separate regulations applicable only to Black Lung hearings which govern most procedures in Black Lung appeals.[117]

Administrative law judges conduct a *de novo* review of the record in Black Lung cases.[118] The administrative law judge is under no affirmative duty to seek out, or even receive, all relevant and material evidence.[119] The formal rules of evidence and procedure do not apply.[120] Documents and witness testimony are admitted freely, and hearsay evidence is admissible so long as it is reasonably reliable and probative.[121] Relevancy is the critical issue regarding the admissibility of evidence, including written medical reports.[122] Any party, including the Department of Labor, can be represented at the hearing, and although any party can waive its right to appear, the hearing can proceed even if all parties fail to appear if the administrative law judge still wishes to hear testimony.[123]

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[110] *Id*. §1201.111.

[111] Thus, the Board has held that "an initial decision must identify all material issues of fact, summarize the evidence on each issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the [administrative judge's] conclusions of law, legal reasoning and the authorities on which that reasoning rests." Maimone v. Dept. of the Navy, 7 M.S.P.R. 406, 407 (1981), *quoting* Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587 (1980).

[112] A party at the hearing is entitled to be represented and advised by counsel, and must be given a reasonable opportunity to secure that right. A denial of this right is a violation of due process. *See* Johnson v. Director, 9 BLR 1-218, 1-220 (1986).

[113] 20 CFR §725.450 (1988). Parties include, in addition to the claimant, the Department of Labor and, if applicable, the responsible coal mine operator, the operator's insurer and other potential prior and successor operators. *Id*. §725.360.

[114] *See id*. §725.451.

[115] *Id*. §725.421.

[116] *See* 29 CFR §§18.1-.59 (1988).

[117] *See* 20 CFR §§725.450-483.

[118] *See generally id*. §725.455(b).

[119] McFarland v. Peabody Coal Company, 8 BLR 1-163, 1-165 (1985) (administrative law judge acted within his discretion in not allowing important blood test to be admitted when it was improperly obtained).

There are special rules concerning the admission of medical reports due to the technical nature of medical evidence in Black Lung cases. Thus, medical reports cannot be submitted at a hearing unless sent to all parties at least twenty days before the hearing.[124] This twenty-day rule can be waived, however, if no objection to the evidence is made at the hearing.[125] Moreover, the judge can waive the rule upon a showing of "good cause" so long as the record is kept open at least thirty days after the hearing to allow for submission of rebuttal evidence.[126] When late evidence is admitted, the ordering of a related post-hearing examination of the claimant may be appropriate as well.[127] Parties are free to submit any new evidence developed subsequent to the adjudication of the claim by the deputy commissioner; however, generally evidence will not be allowed to be submitted at a hearing if it was available but not submitted while the claim was pending before the deputy commissioner unless "extraordinary circumstances" would warrant admission of the evidence at the hearing.[128] Witnesses can be summoned to hearings and, if summoned, are entitled to witness fees.[129] Written notice of the intention to present an expert witness must be provided at least ten days before the hearing.[130]

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[120] Thus, the Federal Rules of Evidence "are not intended to apply to administrative hearings such as those held under the Black Lung Benefits Act." American Coal Co. v. Benefits Review Board, 738 F.2d 387, 390 (10th Cir. 1984). Separate Rules of Evidence have been proposed for Department of Labor administrative law judges, but they would not apply to Black Lung claims. *See* 54 Fed. Reg. 2,310 (1989).

[121] 20 CFR §725.456. *See generally* Republic Steel Corp. v. Leonard, 635 F.2d 206, 208-09 (3rd Cir. 1980). As the Board stated in its decision in *Leonard*, "any evidence which has probative force and tends to prove or disprove a material fact is generally admissible in hearings." Leonard v. Republic Steel Corp., 2 BLR 1-571, 1-577 (1979). *See also* 29 CFR §18.44(b).

[122] Peabody Coal Co. v. Helms, 859 F.2d 486, 489 (7th Cir. 1988). Thus, in Evosevich v. Consolidation Coal Company, 789 F.2d 1021, 1025 (3d Cir. 1986), the court considered the issue of whether the report of a nonexamining physician represented inadmissible hearsay and concluded that such hearsay evidence is admissible "up to the point of relevancy" in administrative proceedings.

[123] *See* 20 CFR §725.461.

[124] *Id.* §725.456(b)(1) (1988). The exchange of documentary evidence twenty days prior to a hearing is required only among parties to the claim, and not to the administrative law judge. Luketich v. Director, 8 BLR 1-477, 1-479 (1986).

[125] *See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-58 (1981).

[126] 20 CFR §725.456(b)(2). *See* Buttermore v. DuQuesne Light Co., 8 BLR 1-36 (1985). The Board has declined to require an administrative law judge to make a specific finding that good cause did not exist to apply the twenty day rule as written. *See* Jennings v. Brown Badgett, Inc., 9 BLR 1-94, 1-96 (1986).

[127] *See* Horn v. Jewell Ridge Coal Corp., 6 BLR 1-933, 1-936-37 (1984).

The issues at the hearing are limited to those set forth by the deputy commissioner, and any other issue raised in writing at the time the claim was pending before the deputy commissioner.[131] The only exceptions are issues "not reasonably ascertainable" when the claim was being adjudicated by the deputy commissioner.[132] If a new issue is presented at the hearing and accepted by the administrative law judge as appropriate, the judge can either remand the claim for determination of the new issue by the deputy commissioner or resolve the new issue at the hearing.[133] With respect to issues properly presented, the administrative law judge is under a duty "to develop fairly all sources of evidence," particularly when a claimant is unrepresented and does not have the capacity to handle the case adequately.[134] This duty is similar to that established for administrative law judges in Social Security adjudications; however, unlike with Social Security cases, the administrative law judge in Black Lung cases cannot order new medical examinations.[135]

The administrative law judge may allow parties to present oral argument and written memoranda.[136] The judge may also allow additional evidence to be submitted after the hearing, but is under no obligation to do so if the evidence could have been presented at the hearing.[137] The record is considered closed when all evidence has been compiled, including a written transcript of the hearing, and all memoranda have been filed.[138] The administrative law judge then issues a written decision and order based on the evidence in the record, including findings of fact and conclusions of law.[139] The Benefits Review Board has held that the administrative hearings decision must be sufficiently detailed to allow for effective review.[140] A party may seek reconsideration of a hearing decision within the time period for filing an appeal with the Benefits Review Board.[141]

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[128] 20 CFR §725.456(d).

[129] *Id.* §725.459(a). These fees must be paid by the party requesting the witness; however, these fees can be recovered from a responsible coal mine operator if the claimant is found eligible for benefits. *Id.*

[130] *Id.* §725.457(a). This requirement can be waived only by consent of all of the parties. *Id.*

[131] *Id.* §725.463(a).

[132] *Id.* §725.463(b). This rule is applied equally to claimants and the Department. Thus, in a recent case the Board reversed a decision of an administrative law judge who allowed the Department to litigate matters that were raised "at the last possible moment" without the Department presenting an "excuse for [its] inaction." Thornton v. Director, 8 BLR 1-277, 1-279 (1985).

[133] 20 CFR §725.463(b).

[134] *See* Laughlin v. Director, 1 BLR 1-488, 1-493 (1978). *See also* York v. Director, 5 BLR 1-833, 1-838 (1983).

[135] *See* York v. Director, 5 BLR at 1-839-840.

[136] 20 CFR §725.459A.

The procedures for a hearing at the Veterans Benefits Administration are unusual in that a veteran may request a hearing either before or after an initial determination on eligibility for benefits is made.[142] This first opportunity for a hearing is really part of the initial decisionmaking process. Until recently, the Rating Board held hearings itself, whether requested before or after an initial determination was made; however, beginning in late 1988, hearings requested following an adverse initial determination by the Ratings Board are heard by a separate hearing officer.[143] Hearings before the Rating Board prior to the issuance of an initial determination or by a hearing officer following a Rating Board determination are both optional. A claimant may, therefore, appeal an adverse Rating Board decision directly to the Board of Veterans Appeals without first requesting a hearing.[144]

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[137] *See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-54-59 (1981). In *Hoffman*, the Board indicated that evidence known at the hearing but unavailable should be admitted. *Id.* at 1-54-55.

[138] 20 CFR §725.475.

[139] *Id.* §725.477. The decision and order is to be filed within twenty days after the last evidence is received. *Id.* §725.476.

[140] *See, e.g.*, Kendrick v. Kentland-Elkhorn Coal Corp., 5 BLR 1-730, 1-731 (1983) (A decision is acceptable if it is "from context or otherwise, . . . possible to discern the reasoning of the administrative law judge and to determine the existence of substantial evidence to support that reasoning"). *See also* Peabody Coal Co. v. Hale, 771 F.2d 246, 249 (7th Cir. 1985) ("if this Court is to perform its function of review . . . more than unexplained conclusions and findings [by the administrative law judge] are necessary, where, as here, the case involves significant conflicting evidence").

[141] 20 CFR §§725.479(b), .481. If reconsideration is requested, a notice of appeal can be filed with the Benefits Review Board within thirty days of disposition of the reconsideration request. *Id.* §725.479(c).

[142] *See* 38 CFR §3.103(c) (1988) (A hearing can be requested "at any time on any issue").

[143] *See* Department of Veterans Affairs, Veterans Benefits Administration DVB Circular 20-89-11 (March 23, 1989) [hereinafter DVB Circular 20-89-11].

[144] Although the Board of Veterans Appeals may in such cases be seen as a first level administrative hearing, it operates more like a final administrative review panel and therefore is

Most hearings at the Veterans Benefits Administration are requested by claimants following an initial determination rather than prior to the Rating Board's initial decision.[145] As noted earlier, the initial decision is transmitted to the claimant through a Notice of Decision. Most post-decision requests for hearings are filed with an appeal from an adverse Notice of Decision, which is initiated by filing a "Notice of Disagreement."[146] The claimant is expected to set out disagreements with the conclusions of law or fact contained in the Notice of Decision; however, the Notice of Disagreement "need not contain specific allegations of error, of fact or law" and must be processed even if "the claimant's contentions may appear to have no merit."[147] A Notice of Disagreement will be effective so long as it "can be reasonably construed as a desire for review."[148]

The Veterans Benefits Administration can respond to a Notice of Disagreement in one of three ways. It may develop the record further and, on the basis of the more fully developed record, review its initial decision; it may review its decision without further development; or, it may decide that no further development or review is necessary.[149] If the Administration decides to affirm the initial decision, with or without further development and review, it must issue a new justification of the decision in the form of a "Statement of the Case."[150] The Statement of the Case is the last action taken by the Administration before an appeal can be filed with the Board of Veterans Appeals, unless a hearing is requested. Its purpose is to give the claimant sufficient information to understand the basis for the decision and to allow the claimant to prepare for an effective appeal.[151] Specifically, a Statement of the Case must include a summary of the evidence relevant to the issues in dispute, a summary of the law and regulations applicable to the case, including appropriate citations, and a statement of the reasons for the decision reached

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discussed together with similar panels in other programs at text accompanying notes 160-275, *infra*.

[145] When hearings are held before the Rating Board makes its initial decision, the hearing is more in the nature of a face-to-face interview and therefore not really part of the appeals process.

[146] 38 CFR §§19.127, 19.118. The Notice of Disagreement must be filed within one year after the date on which the Notice of Decision was mailed to the claimant. *Id.* §19.129. If a Notice of Disagreement is not filed within a year, the initial decision becomes final. *Id.*

[147] Veterans Administration Manual M21-1 §18.03(a).

[148] 38 CFR §19.118. Moreover, it "need not be expressed in any special wording." *Id.*

[149] *See id.* §19.119.

[150] *Id.* §19.119(b).

[151] Veterans Benefits Administration Manual M21-1 §18.07(a). *See also* 38 CFR §19.120(a) (Statement of the Case "should be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans Appeals").

on each issue raised in the case.[152] If a hearing request was filed with the Notice of Disagreement, the Statement of the Case is written to frame issues for the hearing; otherwise, it is written to frame issues for an appeal to the Board of Veterans Appeals.

A hearing requested following the issuance of an adverse Notice of Decision is held by a hearing officer for the purpose of supplementing the evidentiary record compiled and considered by the Rating Board. The hearing officer's duties include reviewing the existing record and evaluating the need for additional evidence, holding an evidentiary hearing, and issuing a decision on the hearing record.[153] The hearing officer has the authority to order additional evidence, including a medical examination at a Department of Veterans Affairs medical facility.[154] The hearing is to cover only issues raised in the Notice of Disagreement; new issues are to be referred back to the Rating Board for evaluation.[155] The hearing officer may request that adjudication staff, including a medical member of the Rating Board, be present at the hearing.[156] Following the hearing, the hearing officer prepares a decision which includes a revised statement of reasons for the determination based on the supplemented record.[157] The claimant is then notified of the decision by the authorization unit in a separate document.[158] If a hearing was held prior to the filing of a Notice of Disagreement, then the claimant can file a Notice of Disagreement from the hearing decision. The Administration will then prepare a Statement of the Case. If a Notice of Disagreement was filed and a Statement of the Case was prepared before the hearing, then a Supplemental Statement of the Case is prepared on the basis of the hearing decision.[159]

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[152] *Id.* §19.120(b). Under certain circumstances, a supplemental statement may be filed. *Id.* §19.122.

[153] *See* DVB Circular 20-89-11, *supra* note 143.

[154] *Id.*

[155] *Id.*

[156] *Id.* The final decision, however, is left entirely to the hearing officer. *Id.*

[157] The decision must follow a prescribed form. *See id.*

[158] *Id.* The authorization must, however, implement the decision of the hearing officer, unless the Regional Office Adjudication Officer initiates an Administrative Appeal. This happens only rarely. *See generally* 38 CFR §§19.138-.142.

[159] DVB Circular 20-89-11, *supra* note 143. It is also possible that the claimant will initiate an appeal to the Board of Veterans Appeals during this period, in which case the hearing officer acts under slightly restricted authority as an agent of the Board. DVB Circular 20-89-11, Change 1 (April 10, 1989).

D. Post-Hearing Administrative Review

All of the programs included in this study provide for a final administrative appeal after an administrative hearing. In all programs a claimant must pursue the final administrative review process as a precondition to judicial review. There are significant differences, however, in the role established for the final administrative review process in the various programs. The most important areas of difference include the treatment of additional evidence and the scope of review.

1. Social Security Appeals Council

The Social Security Administration's Appeals Council reviews decisions of administrative law judges either upon the request of a claimant or on its own motion.[160] A request for review may be filed at one of the Social Security Administration offices within sixty days of receipt of the hearing decision.[161] A request for review is made on a standard form, which includes space for a statement of the reasons for the request.[162] The Appeals Council may dismiss a request for review under limited circumstances;[163] otherwise, the Council must either grant or deny the request for review and then, if it grants the request for review, either issue a decision or remand the case for further administrative action.[164]

The Appeals Council acts as an appellate body over the administrative law judges, and therefore does not hear claims *de novo*.[165] The Council will grant a request for review on one of four bases: if there was an abuse of discretion by the administrative law judge, an error of law in the hearing decision, a lack of substantial evidence supporting the decision, or if the decision presents "broad policy or procedural issues that may affect the general public interest."[166]

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[160] *See* 20 CFR §§404.968, .969 (1988). At one point decisions of administrative law judges with unusually high numbers of favorable decisions or low levels of productivity were "targeted" for review by the Appeals Council on its own motion. This practice, which was subject to much criticism has been abandoned; currently, most cases reviewed on the Council's own motion are selected at random. *See* Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984).

[161] 20 CFR §§404.968(a). The time limit can be extended for good cause. *Id.* §404.968(b).

[162] Thus, the current form, HA-520-U6, includes the same statements as the form requesting an administrative hearing. *See* note 60, *supra*.

[163] For example, a request can be dismissed because it was filed too late. 20 CFR §404.971.

[164] *See id.* §404.967.

[165] Thus, if the Appeals Council makes a finding that is contrary to a credibility finding of the administrative law judge, the Appeals Council must fully articulate its reasons for disagreement and those reasons must be supported by substantial evidence in the record. Smith v. Bowen, 849 F.2d 1222, 1226 (9th Cir. 1988). The Council can assess objective medical evidence more independently. *See* Dupuis v. Secretary, 869 F.2d 622, 623-24 (1st Cir. 1989).

There is a split among the courts of appeals on the requirement of notice by the Appeals Council if it intends to review the entire record in a disability case, even though the claimant only requested review of one aspect of the administrative law judge's decision. The Third Circuit has held that review initiated by the Appeals Council requires the same notice as a request for review by a claimant, which means that it must notify the claimant of its intention to review the claim within sixty days of hearing decision or dismissal.[167] The Eleventh Circuit agrees with the Third Circuit on the requirement of notice; however, it has not addressed the question of whether the notice must be given within the sixty-day time period.[168] Two circuits disagree with the requirement of notice altogether. The Sixth and Seventh Circuits hold that the additional requirement of notice by the Appeals Council is a pointless redundancy for two reasons: first, the claimant initiated the appeal; and, second, partially successful claimants cannot foreclose review of their cases by simply refusing to appeal.[169]

Ordinarily, new evidence cannot be submitted to the Appeals Council unless it is material.[170] The evidence must relate to the period on or before the date of the administrative hearing decision.[171] In practice, however, the

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[166] 20 CFR §404.970(a). The authority of the Appeals Council to review is plenary; several courts have ruled that the Appeals Council may review an administrative law judge's decision regardless of whether regulatory grounds for review were met. *See e.g.*, Fierro v. Bowen, 798 F.2d 1351, 1354 (10th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); Duda v. Secretary, 834 F.2d 554, 556 (6th Cir. 1987) ("[regulations] do not limit Appeals Council's power to review . . . but rather set out the situations where the Appeals Council *must* review the [administrative law judge's] decision").

[167] *See* Kennedy v. Bowen, 814 F.2d 1523, 1527 (11th Cir. 1987).

[168] *See* Powell v. Heckler, 789 F.2d 176, 180 (3d Cir. 1986).

[169] *See* Delong v. Heckler, 771 F.2d 266, 268 (7th Cir. 1985); Gronda v. Secretary, 856 F.2d 36, 38 (6th Cir. 1988).

[170] *See* 20 CFR §404.970(b).

[171] *Id.* §404.976(b). A specific showing of good cause for presenting new evidence at the Appeals Council level is not required. Cummings v. Bowen, 677 F.Supp. 975, 979 (N.D. Ill. 1988). The Social Security Administration proposed in 1983 that the Appeals Council would not be able to consider any evidence submitted after the issuance of a hearing by an administrative law judge. *See* 48 Fed. Reg. 21,967 (1983). This was in response to Pub. L. No. 96-265 §306, which foreclosed the introduction of evidence that occurred after the decision of the administrative law judge. The Administration received many comments supporting the submission of evidence for good cause at the Appeals Council level. 52 Fed. Reg. 4003 (1987). In response, it promulgated the rule allowing evidence to be submitted to the Appeals Council if it is material and if it relates to the period before the decision of the administrative law judge. *Id.*

Council has been quite lenient in considering new evidence submitted by claimants.[172] The Council will consider this evidence, as well as other evidence that was overlooked by the agency or the administrative law judge, in deciding whether to remand a claim for further factual development.[173] If the new evidence relates to a condition that arose only after the administrative hearing record was closed, or to a deterioration of a condition that occurred only after the record was closed, the Appeals Council cannot consider that evidence.[174] Recognizing that often it is difficult to categorize a piece of medical evidence as relating solely to a new condition or post-hearing deterioration, the Council has tended to consider evidence that arguably covers the relevant time period; however, if the new evidence clearly falls outside that period, it is returned to the claimant with instructions to file a new application.[175]

In practice, the Appeals Council rarely grants a request for review. Although the Council may hear oral arguments in cases which raise important issues of law or policy, when it does grant review it usually issues a new decision or remand order at the same time. The Appeals Council has been criticized recently in a recent Administrative Conference study as an ineffective appellate tribunal.[176]

A decision by the Appeals Council dismissing a request for review, denying a request or, following the granting of a request for review, to affirm, modify or reverse the hearing decision is a final decision by the Social Security Administration subject to judicial review.[177] If the Council remands the claim an administrative law judge will make a new decision which itself will be appealable back to the Appeals Council.

2. Final Administrative Review in Other Programs

Final administrative review of disability adjudications tends to be more extensive and thorough in other programs than in the Social Security program. This is true in part because the numbers of cases appealed to the final administrative level are substantially less, except at the Board of Veterans Appeals which also hears more than 40,000 cases per year.[178] Another reason is that judicial review, when available, is only to the United States courts of appeals, as opposed to the district courts in the Social Security program.[179] Also, the decision of two final administrative appeal boards, the Merit Systems Protection Board and the Benefits Review Board, are published and given full precedential effect.

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[172] *See* Koch and Koplow, A Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council 108-10 (Administrative Conference of the U.S. 1987).

[173] *See* 20 CFR §404.977.

[174] This requirement was included in 1980 amendments to the Social Security Act and implemented by regulation for claims filed after May, 1986. *See* 42 U.S.C. §402(j)(2) (1982); 52 Fed. Reg. 4004 (1987).

[175] *See* Koch & Koplow, *supra* note 172, at 109-10; 20 CFR §404.976(b).

[176] The study and the Conference's recommendations following the study are discussed in detail at text accompanying notes 329-42, *infra*.

[177] *See* 20 CFR §404.981.

As in the case with other levels of administrative appeal, the final administrative appeal procedure in the Railroad Retirement program is most like that of the Social Security Appeals Council. This function is performed by the Railroad Retirement Board.[180] Although the Board may consider new evidence, it rarely does so; instead, it will usually rely on the record developed by the referee at the hearing. The Board has authority to affirm or reverse the decision, and to remand the claim to the referee or Bureau of Retirement Claims for appropriate action.[181] A decision by the Board is a precondition for judicial review in the federal courts of appeals.[182]

Appeals from administrative hearing decisions in Civil Service Disability Retirement cases are heard by the Merit Systems Protection Board.[183] There are three members of the Board, including a chair and a vice chair.[184] As noted earlier, the Board also has the formal responsibility for providing administrative hearings which are held by administrative judges.[185] The Board hears appeals from all types of cases decided by administrative judges; indeed, the majority of the Board's case load involves federal personnel issues rather than claims for disability retirement benefits.

The Merit Systems Protection Board reviews administrative judge decisions in a manner similar to that of the Appeals Council, except that the grounds for review are somewhat more limited. A petition for review must be filed within thirty-five days after the administrative hearing decision was issued.[186] In addition, the Board has broad authority to reopen an administrative judge's decision even after it has become final; however, this power is exercised rarely and only under extraordinary circumstances.[187] Thus, the Board reopened a case to decide whether a Court of Appeals decision overruling the basis for the previous decision should be applied retroactively.[188] As is the case with Social Security disability appeals, a claimant for Civil Service disability retirement benefits must petition the Board for review of the administrative judge's decision as a precondition of judicial review.[189] Judicial review is available in the federal Court of Appeals for the Federal Circuit.[190]

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[178] *See* Appeals Statistical Data--Board of Veterans Appeals (May 1989).

[179] Currently, there is no judicial review from decisions of the Board of Veterans Appeals; however, effective in Fall 1989, judicial review will be available in a new Article I Court of Veterans Appeals. *See* text accompanying note 245, *infra*.

[180] *See* 20 CFR §260.9 (1988).

[181] *Id.* §260.9(e).

[182] Appeals are heard in the United States courts of appeals for the Seventh Circuit, the District of Columbia Circuit or the circuit where the claimant lives. *See* 45 U.S.C. §§231g, 355f (1982, Supp. IV 1986).

[183] 5 U.S.C. §§7701, 8347(d) (1988); 5 CFR §1201.3(a).

[184] *Id.* §1200.1, .2. Members are appointed by the President and serve for a period of seven years. *Id.* §1200.1.

[185] *See* text accompanying notes 142-44, *supra*.

There are two grounds for reviewing a hearing decision in Civil Service disability benefits cases: when "[n]ew and material evidence is available that, despite due diligence, was not available when the record was closed," and when "[t]he decision of the presiding official is based on an erroneous interpretation of statute or regulation."[191] A petition for review must set forth objections to the hearing decision "supported by references to applicable law or regulations, and with specific reference to the record."[192] Although the Board does not always adhere strictly to this requirement of specificity,[193] it does require some statement as to why the administrative judge erred in rejecting the claimant's arguments at the hearing.[194]

The Board has construed the "new and material" evidence ground for review to cover only information not available before the record was closed at the administrative hearing.[195] Thus, a claimant cannot cure on a petition for review a claim that was documented poorly at the hearing. Likewise, a claimant may not submit information on a medical condition that a physician failed or refused to provide during the hearing.[196] On the other hand, medical evidence of a deterioration in the claimant's condition or the emergence of a new symptom only after the record was closed can be a basis for review.[197] The rule has been relaxed somewhat to allow the submission of evidence not generally available at the time of the hearing, or which was not introduced because the claimant had reason to believe that it was or would be included in the record.[198] Even if the evidence is new, it must "be of sufficient weight to warrant a finding different from that in the initial decision."[199]

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[186] 5 CFR §1201.114(d).

[187] *See id.* §1201.117; Dawson v. Merit Systems Protection Board, 712 F.2d 264, 266-67 (7th Cir. 1983).

[188] *See* Stephens v. Office of Personnel Management, 30 M.S.P.R. 680, 681-82 (1988).

[189] *See* 5 CFR §1201.116(b), 118, .119.

[190] *See* 5 U.S.C. §7703(a)(1), (b)(1) (1982); Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985).

[191] 5 CFR §1201.115.

[192] *Id.* §1201.115.

[193] *See, e.g.*, Voseipka v. Office of Personnel Management, 7 M.S.P.R. 177, 178 (1981).

[194] *See* Rasheed v. Department of the Air Force, 6 M.S.P.R. 524, 526 (1981).

[195] Stalliviere v. Office of Personnel Management, 31 M.S.P.R. 647, 648 n.2 (1986) ("The Board will not consider [evidence] raised for the first time in [a] petition for review absent a showing that such arguments are based on new and material evidence that, despite due diligence was not available prior to closing of record"). Thus, documentation of a diagnosis that could have been made at the time of the hearing is not a basis for review. Frazier v. Office of Personnel Management, 7 M.S.P.R. 428, 430 (1981). *See also* Nathan v. Office of Personnel Management, 15 M.S.P.R. 359, 361 (1983) (Subjective evidence of pain that was not presented at the hearing not a basis for review).

The "erroneous interpretation of statute or regulation" ground for review is intended to cover cases where the administrative judge applied an incorrect legal standard.[200] On the other hand, the Board will refuse to review cases challenging the administrative judge's "findings of fact, credibility determinations and interpretation of the evidence."[201] The Board defers to the administrative judge's credibility determinations only when the administrative judge fully sets forth the reasons for his or her findings.[202] The Board does consider a petition alleging that the administrative judge applied an improper standard of proof to amount to the application of an incorrect legal standard.[203] Thus, it has reviewed disability retirement cases if in its view the evidence was sufficient to establish disability according to the requisite standard of proof.[204] Review will be denied, however, if the Board finds that errors were, in effect, harmless.[205]

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[196] *See* Pecukonis v. Office of Personnel Management, 34 M.S.P.R. 411, 415 (1987).

[197] *See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581 (1981) (Report of infarction which occurred after record closed considered new evidence); Robinson v. Office of Personnel Management, 21 M.S.P.R. 744 (1984) ("new evidence" requirement met where doctor was incapacitated at the time of the hearing and therefore was unable to prepare a report).

[198] *See, e.g.*, Waite v. Office of Personnel Management, 9 M.S.P.R. 533 (1982) (Claimant relied on Office of Personnel Management to submit a portion of the file after ordered to do so, but material not submitted).

[199] Janke v. Office of Personnel Management, 7 M.S.P.R. 140, 141 (1981). Thus, in Treptow v. Office of Personnel Management, 32 M.S.P.R. 387 (1987), even if a CT Scan could not have been done before an administrative judge's decision was issued, the fact that the claimant failed to show that report warranted a different outcome in the case precluded review of the case. *See also* Robinson v. Office of Personnel Management, 21 M.S.P.R. 744, 746 (1984) (doctor's report shown to easily meet the "new" requirement but not qualify as material because it only further documented the same information about claimant's medical condition).

[200] *See, e.g.*, Forde v. Office of Personnel Management, 7 M.S.P.R. 559, 560 (1981). (Reliance on case that had been overruled.)

[201] Godfrey v. Defense Mapping Agency, 7 M.S.P.R. 338, 339 (1981). *See also* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986). ("Special deference must be given to administrative judge's findings on credibility of witnesses.")

[202] Addison v. Department of Treasury, 30 M.S.P.R. 615, 618 (1986). *See also* Macijaukas v. Department of the Army, 34 M.S.P.R. 564 (1987) ("[the] administrative judge's failure to state basis for finding the witness to be credible . . . warrants the Board's review").

When the Board decides to review a hearing decision, it may decide the case on the merits or remand the case for a further hearing or for further development by the Office of Personnel Management.[206] The Board reviews all of the evidence in the record, including admissible new evidence; however, the Board is likely to remand a case when new evidence indicates that other factual development may be necessary.[207] When it does undertake to review a decision, the Board considers itself "free to substitute its own determinations of fact for those of the [administrative judge], giving the [administrative judge's] findings only so much weight as may be warranted by the record and by the strength of the [administrative judge's] reasoning."[208] However, with respect to credibility determinations by the administrative judge, the Board will find otherwise only if the reasoning on which the administrative judge made the finding is considered erroneous.[209] The Board issues a written decision, which is a final decision subject to judicial review.[210]

The Board's decisions have been published since 1985 in the U.S. Merit Systems Protection Board Reporter.[211] Board decisions have precedential effect and are binding on the administrative judges who conduct administrative hearings on behalf of the Board. The Board has recognized, however, that its authority "is subordinate to that of [the] judicial system," and therefore it is bound by applicable federal court decisions.[212]

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[203] *See, e.g.*, Cope v. Department of the Navy, 7 M.S.P.R. 546, 548 (1981). ("A misapplication of the proper standard of proof [is] sufficient to warrant a review of the [administrative judge's] fact finding.")

[204] *See, e.g.*, Wommack v. Office of Personnel Management, 7 M.S.P.R. 218 (1981).

[205] *See* Sears v. Office of Personnel Management, 33 M.S.P.R. 595, 598 (1987) ("administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights"). *See also* Dooley v. Office of Personnel Management, 22 M.S.P.R. 577 (1984).

[206] 5 CFR §1201.116.

[207] *See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581, 582 (1981) (New evidence of heart condition insufficient to show extent of damage); Jolly v. Office of Personnel Management, 7 M.S.P.R. 507, 509 (1981).

[208] Chisolm v. United States Postal Service, 7 M.S.P.R. 116, 118 (1981).

[209] *See, e.g.*, Miller v. United States Air Force, 8 M.S.P.R. 204, 207 (1981). *Cf.* Payne v. Department of Health and Human Services, 6 M.S.P.R. 217, 220 (1981). ("The board must give due deference to the credibility assessments of the [administrative judge] who was present to hear and observe the demeanor of the three witnesses.")

[210] 5 CFR §§1201.116(b), .118.

[211] The Board published its decisions itself until 1985. The U.S. Merit Systems Protection Board Reporter, published by West Publishing Company, includes all pre1985 decisions of the Board as well.

Administrative law judge decisions in the Black Lung program are reviewed in a similar manner by the Benefits Review Board.[213] Until 1984, the Board consisted of three members, including a chair and two associate members; in 1984, the membership was increased to five permanent members, together with authority for the appointment of up to four additional temporary members.[214] The Board is operating currently with five permanent and four temporary members. Cases are still decided, however, by panels of three members; in limited circumstances, the Board will rehear cases *en banc*.[215]

The process of initiating an appeal to the Benefits Review Board is somewhat more complicated and elaborate than with other programs, in part because of the number of different parties involved and the adversarial nature of the process. An appeal to the Board is commenced with the filing of a written notice of appeal.[216] The notice may be in any form so long as it "reasonably permits identification of the decision from which an appeal is sought."[217] The notice is served on all parties affected by the decision; the petitioner must then identify the substantive issues involved in the appeal by filing a petition for review within thirty days of receipt of acknowledgement of the notice of appeal.[218] The petition for review must include "a statement which specifically states the issues to be considered by the Board," and must be accompanied by a brief, memorandum of law, or other supporting statement.[219] The petition is served on all of the parties to the appeal, who then have thirty days to file a response.[220] An appellant may raise any issue; however, the Board will not consider new issues raised in responsive pleadings unless a prevailing party, in response to a petition, raises a new issue in support of the hearing decision.[221] The Board can refuse to consider an issue raised in a petition for review if it is not briefed adequately by the party raising the issue.[222] The Board will relax its formal procedures in this regard, however, when a petitioner is unrepresented[223] or when the issue involved "is basic to the proper administration of the act or to the rendering of justice in the individual case."[224]

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[212] *See* McAnallen v. Office of Personnel Management, 7 M.S.P.R. 616, 618 (1981). The Board has held that an unpublished Federal Circuit decision does not have precedential value in its proceedings. Averill v. Department of Navy, 30 M.S.P.R. 327, 330-31 (1986).

[213] *See* 30 U.S.C. §932(a) (1982). The Benefits Review Board was established originally to hear appeals involving claims under the Longshore and Harbor Compensation Act; its authority to hear appeals in Black Lung cases is derived from a general incorporation of Longshore and Harbor Worker's Compensation Act procedures into the Black Lung Benefits Act.

[214] *See* Longshore and Harbor Workers Compensation Act amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984).

[215] *See* Borgeson v. Kaiser Steel Corp., 8 BLR 1-312 (1985).

[216] The notice must be filed at the Board's office in Washington within thirty days of the issuance of the decision, or the issuance of a decision disposing of a timely request for reconsideration. 20 CFR §§802.205, .206 (1988). In a recent case the Board ruled that the standard upheld in the Third Circuit would be applied to all circuits, which dictates that the 30-day period begins to run on the date that the administrative law judge's decision is actually filed with the deputy commissioner's office. Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[217] 20 CFR §802.208(b). The parties affected must also be identified. *Id.*

[218] *Id.* §802.211(a).

The Benefits Review Board is an appellate tribunal; it does not hear cases *de novo*.[225] The Board reviews findings of fact by administrative law judges according to a substantial evidence standard, using the traditional formulation of "more than a mere scintilla," or "evidence which 'a reasonable mind might accept as adequate to support a conclusion.'"[226] Thus, "[i]t is the administrative law judge's duty to weigh the evidence and make findings of fact. That the . . . [Board] might draw different inferences from the evidence is of no significance."[227] The evaluation of medical evidence is, for these purposes, a question of fact; it is the administrative law judge's responsibility to evaluate the credibility of medical evidence and the Board will defer to the administrative law judge's findings.[228] However, the administrative law judge must determine the credibility and consider the underlying basis of the evidence upon which he or she relies in the decision, and not just accept it at face value.[229] The Board will not receive new evidence. If the basis for an appeal is that the administrative law judge refused to consider certain evidence, the Board's usual practice is to remand the case for proper evaluation.[230] Indeed, the Board has been reversed for evaluating the sufficiency of a medical report ignored by the administrative law judge rather than remanding the case.[231]

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[219] *Id.* §§802.211(a), (b).

[220] *Id.* §802.212. Any party receiving a response to a petition can then file a reply to the response within twenty days. Id. §802.213.

[221] Pokorny v. U.S. Steel Corp., 6 BLR 1-67, 1-69 n.2 (1983). *See also* King v. Tennessee Consolidation Coal Company, 6 BLR 1-87, 1-90-91 (1983).

[222] *See* Wetherill v. Green Construction Company, 5 BLR 1-248, 1-251 (1982).

[223] *See generally* 20 CFR §802.220 ("The Board may prescribe an informal procedure . . . to be followed by . . . [an unrepresented] party"). *See also* Hurd v. Director, 5 BLR 1-106, 1-107 (1982).

[224] *Hurd*, 5 BLR at 107.

[225] *See* Parker v. Director, 590 F.2d 748, 749 (8th Cir. 1979) ("The [Board] does not have the authority to undertake a *de novo* review of the evidence . . . or to substitute its views for the administrative law judge"). As the Board stated in McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1251 (1981), it is "an independent judicial tribunal with exclusive jurisdiction to consider and decide appeals raising substantial questions of law or fact under the Black Lung Benefits Act."

[226] Taranto v. Barnes and Tucker Company, 4 BLR 1-308, 1-310 (1981) (quoting Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)). The Board's scope of review is defined by statute. Hoskins v. Shamrock Coal Company, 12 BLR 1-117, 1-118 (1989) (quoting O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965)).

[227] Hamilton v. The New River Company, 4 BLR 1-190, 1-195 (1981). *See also* Clark v. Director, 838 F.2d 197, 200 (6th Cir. 1988). ("The finding of an [administrative law judge] in a black lung case may not be set aside if it is based on substantial evidence viewing the record as a whole, even if we would have taken a different view of the evidence were we the trier of facts.")

The Board also will review a hearing decision in order to assure that the decision is consistent with applicable law.[232] Although the Board gives deference to the Department of Labor's interpretation of its regulations, the Board takes the position that it may base its decision on its reading of both the constitution and the Black Lung Benefits Act.[233] The Board will respect decisions of the courts of appeals; however it considers itself bound only by the rulings of the circuit in which the case being decided was filed.[234] However, the Board may, in the interest of fairness and efficiency, rule that a standard used in one circuit be used in all circuits.[235]

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[228] *See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (The administrative law judge "has great discretion" in evaluating the credibility of medical evidence).

[229] Addison v. Director, 11 BLR 1-68, 1-70 (1988). *See also* Ware v. Director, 814 F.2d 514, 516 (1987) (administrative law judge must view medical opinion "in light of studies conducted and the objective indications upon which the medical opinion or conclusion is based").

[230] *See, e.g.*, Swinney v. Director, 5 BLR 1-233, 1-234 (1983) ("If there were any evidence to support an award of benefits which the administrative law judge failed to consider, the Board normally would remand"). *See also* Defore v. Alabama By-Products Corporation, 12 BLR 1-27, 1-28 (1988) ("The regulatory criteria at [20 CFR] §718.204(c) require that the administrative law judge weigh all relevant probative evidence. [T]hus, on remand, the administrative law judge should consider . . . the other . . . evidence of record").

[231] *See* Director v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983). ("The determination as to whether . . . [the medical] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the fact finder to decide.")

[232] *See, e.g.*, Edwards v. Director, 6 BLR 1-265, 1-266 (1983). *See also* 33 U.S.C. §921(b)(3) (1982); 20 CFR §802.301 The Board can set aside findings of fact and conclusions of law "only if they are not . . . supported by substantial evidence in the record considered as a whole or in accordance with law"). The Board will be reversed when it fails to limit its review to a finding of substantial evidence and instead attempts to substitute its own judgment on weight and sufficiency of evidence. *See* Zbosnik v. Badger Coal Co., 759 F.2d 1187, 1190 (4th Cir. 1985).

The Board hears most cases without oral argument.[236] Although the Board may issue a summary decision where prior decisions of the Board or the administrative law judge's decision address all issues raised on the appeal, in most cases the Board must issue "a full, written decision discussing the issues and applicable law."[237] The Board may affirm, reverse, or otherwise modify the administrative law judge's decision, or may remand the case for further administrative proceedings.[238] A party may seek reconsideration of the Board's decision; however, a request for reconsideration is not required to exhaust administrative remedies and may be granted or denied at the discretion of the Board.[239] Generally, the Board will not consider new issues on reconsideration.[240] Decisions of the Benefits Review Board in Black Lung cases are published in the Black Lung Reporter.[241]

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[233] *See* McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1250 (1981) (constitutional interpretation); Jones v. The New River Company, 3 BLR 1-199, 1-208-209 (1981) (statutory interpretation). *See also* Kovalchick v. Rochester and Pittsburgh Coal Company, 5 BLR 1-670, 1-673 (1983) (The Board is "not free to ignore the language of the statute"). The Board's authority to invalidate regulations on the basis of the act has been upheld by courts of appeal. *See, e.g.*, Gibas v. Saginaw Mining Company, 748 F.2d 1112, 1117-18 (6th Cir. 1984); Carozza v. United States Steel Corp., 727 F.2d 74, 77 (3rd Cir. 1984). At least one court has held otherwise on the question of constitutional rulings. *See* American Stevedores, Inc. v. Salzano, 538 F.2d 933, 936 (2nd Cir. 1976). The Board expressly disagreed with *American Stevedores* in McCluskey v. Zeigler Coal Company, 2 BLR at 1-1254-62.

[234] *See* Kuhar v. Bethlehem Mines Corp., 5 BLR 1-765, 1-769 n.2 (1983); Cooley v. Alabama By-products, 5 BLR 1-816, 1-820 n.5 (1983).

[235] *See* Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[236] Oral argument can be requested under special circumstances, such as when the appeal presents novel issues, involves a substantial question of law on which there is a conflict among the administrative law judges, or if to do so will serve "the interest of justice." 20 CFR §802.304.

[237] *See* 20 CFR §§802.404(b), (c).

[238] *Id.* §802.404(a). The case can be remanded to the administrative law judge or to the deputy commissioner. Following the remand, the new decision is submitted to the Board and the parties are given an opportunity to respond. *See id.* §802.405(a).

[239] *See id.* §§802.407(b), .409.

[240] *See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (Citing 20 CFR §802.409).

[241] The Black Lung Reporter, published by Matthew Bender, also includes selected administrative law judge decisions.

Appeals from adverse decision in Veterans disability benefits claims based on a Rating Board determination or, if a hearing was held after a Rating Board determination, on a hearing officer's decision, are heard by the Board of Veterans Appeals.[242] The Board is made up of approximately sixty members, including a chair.[243] The Board operates quite differently from the Social Security Administration's Appeals Council on the one hand, and the Merit Systems Protection Board and Benefits Review Board on the other hand. In a sense, it incorporates both the informality of the Appeals Council and the more significant authority exercised by the Merit Systems Protection Board and the Benefits Review Board. It is uniquely different, however, because it operates, at least in the area of disability appeals, free from judicial review.[244] The overall result is an autonomous appellate board that operates without significant external control, a fact which led in part to legislation in 1988 to establish judicial review from Board of Veterans Appeals benefit decisions beginning in the Fall 1989.[245]

An appeal to the Board of Veterans Appeals is initiated by filing a Substantive Appeal from a Statement of the Case issued following an adverse decision by the Rating Board, or from an adverse decision issued following an administrative hearing held by a hearing officer.[246] There are extensive specific requirements for a Substantive Appeal, which must be submitted on a prescribed form or by letter containing all information included on the form.[247] A Substantive Appeal must identify all legal and factual arguments for the appeal and must relate those arguments whenever possible to the reasoning included in the explanation of the original decision included in the

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[242] *See generally* 38 U.S.C. §§4001-4006; 38 CFR §§19.1-19.2.

[243] The chair is appointed by the President; other members are appointed by the Administrator from recommendations by the chair, subject to approval by the President. Veterans' Judicial Review Act, tit. II, §201, 102 stat. 4105, 4109 (to be codified at 38 U.S.C. §4001). The chair serves for six years; other members serve for nine years. *Id*. Previously, all members of the Board were selected by the Administrator with the approval of the President. *See* 38 U.S.C. §4001 (Supp. IV 1986).

[244] Constitutional issues can be reviewed. *See* Johnson v. Robinson, 415 U.S. 361 (1974).

[245] Appeal will be to a new Article I Court of Veterans Appeals. *See* Veterans Judicial Reform Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

[246] A Statement of the Case is prepared following an adverse decision for veterans benefits, with or without an administrative hearing. If an administrative hearing is requested after a Rating Board decision, the Statement of the Case is prepared for the hearing. *See generally* text accompanying notes 149-59, *supra*. The Substantive Appeal must be filed within sixty days of the mailing of the statement of the case or within one year of the date of the original notice of decision, whichever is later. 38 CFR §19.129(b).

[247] *See id*. §19.123(a) (Appeal on VA Form 1-9 or on "correspondence containing the necessary information").

Statement of the Case.[248] Although the Board is to construe arguments set out in a Substantive Appeal "in a liberal manner for purposes of determining whether they raise issues on appeal,"[249] it presumes that there is no objection to any statement of fact included in the Statement of the Case unless objected to specifically.[250]

The Substantive Appeal is filed at the office that originally decided the claim.[251] Before the Board assumes jurisdiction over the appeal, the regional office files a formal Certification of Appeal in which it identifies the issues raised in the appeal and certifies that all necessary procedural steps have been met.[252] The office has the option, if appropriate, to retain the case for further development or to advise the claimant that the statement of legal and factual errors included in the Substantive Appeal are deficient and to allow necessary amendments.[253] When new evidence is submitted before the record has been transferred to the Board, the evidence will be considered at the local office which can then issue a supplemental Statement of the Case.[254] A Substantive Appeal without allegations of specific errors of fact or law may be dismissed.[255]

Usually appeals are heard by the Board in panels of three members, referred to as Board Sections.[256] Sections have general areas of jurisdiction, including certain general areas of medical disability. One member of each section is a physician; the other two members are lawyers. Physician members of the Board are not expected to be specialists in the medical areas involved in an appeal; indeed, the Board has rejected suggestions that psychiatrists be used in mental disability cases noting that expert medical advice is available when needed.[257]

Unlike the Appeals Council, Merit Systems Protection Board and Benefits Review Board, the Board of Veterans Appeals holds actual hearings in many appeals. Most hearings are held at the offices of the Board in Washington, although hearings can be held by traveling sections of the Board or by

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[248] *Id.* §19.123(a). The substantive appeal must also identify clearly the benefits sought on the appeal.

[249] *Id.* §19.123(a).

[250] *Id.* §19.121(b).

[251] *Id.* §19.127.

[252] *Id.* §19.123(b).

[253] *See* Veterans Administration Manual M21-1 §18.13.

[254] 38 CFR §19.173.

[255] *Id.* §19.126.

[256] *See id.* §19.161.

[257] *See* 48 Fed. Reg. 6963 (1983).

Veterans Benefits Administration personnel at regional offices.[258] The primary purpose of Board hearings is to allow for oral argument; however, additional documentary evidence may be presented at Board hearings and witnesses can testify.[259] When evidence is submitted to the Board, the Board has the option of referring the matter back to a local office for reconsideration.[260] The Board will not compel the appearance of witnesses.[261]

Board hearings are nonadversary.[262] The formal rules of evidence do not apply, and formal cross examination is specifically precluded; however, "follow up questions" are allowed.[263] The Board may request an expert medical opinion from the chief medical director or from an independent expert. A similar request may be made by an appellant as well.[264] If an expert opinion is obtained by the Board, a copy of the report will be sent to the appellant who then has sixty days to respond.[265] The Board also has the option to remand a case for further development.[266]

The Board must issue a written decision disposing of each issue raised by the appeal, including separate findings of fact and conclusions of law, and reasons for the decision.[267] Board decisions must be "based on a review of the entire record."[268] The Board considers itself bound only by Department of Veterans Affairs regulations, other instructions to the Board issued by the Veterans Benefits Administration and opinions of the Department's general counsel.[269] The Board does not consider itself bound by Veterans Benefits Administration manuals.[270] Most importantly, the Board does not consider itself bound by its own prior decisions. As stated in Board regulations,

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[258] When hearings are held at regional offices, the final decision is made by members of the Board based on the record compiled at the hearing. *See* 38 CFR §19.160(c).

[259] *See* Veterans Administration Manual MBVA-1 §5.02. *See also* 38 CFR §19.157(b).

[260] *See id.* §19.174.

[261] *Id.* §19.165(a). The Board has stated that it lacks authority to subpoena administration personnel. *See* 48 Fed. Reg. 6966 (1983).

[262] 38 CFR §19.157(c).

[263] *Id. See also* Veterans Administration Manual MBVA-1 §5.11.

[264] *See* 38 CFR §§19.176-178. An appellant's request "will be granted upon a showing of good cause, such as where complex or controversial medical issues are involved in the appeal." *Id.* §19.178.

[265] *Id.* §19.179. Under certain circumstances, the opinions are made available only to the appellant's attorney or representative. *See* 38 U.S.C. §3301.

[266] *See* 38 CFR §19.182(a).

[267] *Id.* §19.180(b), (c).

[268] *Id.* §19.180(a).

[269] *See* 38 U.S.C. §4004(c); 30 CFR §19.103(a).

[270] *Id.* §19.103(b).

"[p]reviously issued Board decisions will be considered binding only with regard to the specific case decided; prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case."[271] Moreover, Board decisions are not published or easily available; the only index is on microfiche and individual decisions must be obtained by mail.

An appellant may seek reconsideration of a Board decision, and the Board can reconsider its decision on its own motion. This can be done at any time on the basis of an "obvious error of fact or law" or when "new and material evidence" is obtained from service department records.[272] The Chair may deny a request for reconsideration; if a request for reconsideration is granted, it is heard by the section that heard the case originally supplemented by an equal number of additional Board members.[273] Once the Board issues its decision or its decision on reconsideration, the decision is binding and subject only to limited judicial review.[274] There is, however, a relatively liberal policy allowing claims to be reopened based on new evidence.[275]

III. ADMINISTRATIVE CONFERENCE RECOMMENDATIONS RELATING TO SOCIAL SECURITY ADMINISTRATIVE APPEALS

The Administrative Conference has published three sets of recommendations concerning the administration of Social Security disability claims. The first set of recommendations was published in 1978, and dealt primarily with administrative hearing procedures.[276] These recommendations were based largely on the findings of a major study commissioned by the National Center for Administrative Justice.[277] The other two sets of recommendations were published in 1987, based on reports prepared for the Administrative Conference. One set of recommendations dealt with state agency disability determinations, with a special emphasis on the value of face-to-face procedures for initial and reconsidered disability determinations.[278] The other set of recommendations were directed at the Appeals Council.[279]

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[271] *Id.* §19.197. The Board has rejected suggestions that it consider its prior decisions as precedent. *See* 48 Fed. Reg. 6968 (1983).

[272] 30 CFR §19.185.

[273] *Id.* §19.189(b).

[274] There is provision for certain limited constitutional challenges under present law. More general judicial review will be available in late 1989. *See* text accompanying notes 244-45, *supra*.

[275] *See* 38 CFR §3.114. Reopening is discussed generally at text accompanying notes 49-50, *supra*.

[276] *See* Recommendation No. 78-2, 1 CFR §305.78-2 (1988) [hereinafter Recommendation 78-2].

[277] For a published version of that study, *see* J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, M. Carrow, Social Security Hearings and Appeals (1978). Professor Mashaw prepared a separate report for the Administrative Conference drawing from the earlier study. *See* J. Mashaw, Report to the Grants and Benefits Committee on the Social Security

The 1978 recommendations were the most comprehensive, in that they sought to deal with a broad range of concerns about the efficiency and competence of the Social Security Administration's administrative appeals process. The study which led to the Conference's 1978 recommendations identified three main concerns about Social Security administrative hearings: delays in processing appeals at the administrative hearing level and a resulting backlog of cases awaiting hearing, high reversal rates of state agency decisions by administrative law judges, and substantial variances in reversal rates among the administrative law judges.[280] These concerns, which raised serious questions of speed, accuracy and consistency in the process, together with related concerns about claimant satisfaction and administrative costs, were found, however, to be manageable within a modestly revised system for administrative appeals.[281] As a result, the Administrative Conference specifically declined to endorse any radical changes. As stated in the introduction to its formal recommendations, "more dramatic proposals for reform of the [Social Security disability appeals] system are inadvisable . . . [T]he difficulties are not so overwhelming that the proposal of a markedly different system is required. Hence the recommendations that follow are for the most part interstitial and conservative. Their purpose is to prescribe

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Hearings and Appeals Process, in Administrative Conference of the United States, Recommendations and Reports (1978) [hereinafter 1978 Report].

[278] *See* Recommendation No. 87-6, 1 CFR §305.87-6 [hereinafter Recommendation 87-6]. *See generally* A. Schoenberger, State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration, (Administrative Conference 1987) [hereinafter 1987 State Agency Report].

[279] *See* Recommendation No. 87-7, 1 CFR §305.87-7 [hereinafter Recommendation 87-7]. *See generally* C. Koch and D. Koplow, A Fourth Bite at the Apple: A Study of the Social Security Administration's Appeals Council (Administrative Conference 1987) [hereinafter 1987 Appeals Council Report].

[280] 1978 Report, *supra* note 277, at 83-85. The report, drawing on congressional material, notes that the processing time for hearings had risen from 118 days in 1971 to 217 days in 1975, and that in June 1977, nearly 3,000 more hearing requests were filed than the number of appeals completed. The report also notes that the reversal rate for administrative law judges was almost fifty percent, but less than half of the judges had a reversal rate within a ten percent variance of that average. *Id.*

[281] *Id.*, at 86.

improvements while reinforcing sound practice."[282] The 1987 recommendations on state agency determinations were limited by the fact that the Social Security Administration was in the process of running demonstration projects to assess the viability of holding evidentiary hearings and personal interviews as part of a one-step initial determination process in place of the present separate initial decision and reconsideration procedures.[283] Although certain preliminary conclusions supporting the use of face-to-face procedures were presented, most of the recommendations were of a contingent nature depending on the final results of the demonstration projects.[284]

The 1987 recommendations on the Appeals Council offered the most radical suggestions for change of all three sets of recommendations. The report accompanying the recommendations concluded that the Appeals Council is simply unable to provide meaningful review of the tremendous volume of cases submitted to the Council each year.[285] In Fiscal Year 1988, the Council handled more than 100,000 cases, including approximately 80,000 reviews of individual claims.[286] Laboring under an unmanageable caseload also resulted in a failure to identify and pursue appropriate goals.[287] Accordingly, the Conference recommended that the Appeals Council reduce drastically the number of individual claims it reviews and shift its orientation toward policy making.[288]

Although each of the three sets of recommendations concentrated on one level of the administrative appeals process, each set has implications for the appeals process as a whole. Similarly, procedures in place at one level of the appeals process have an impact on recommendations for change elsewhere in the process. It was recognized in the state agency study, for example, that adding a face-to-face interview at the initial decision level could not be considered a substitute for administrative hearings without considering major additional changes in the process.[289] Similarly, one of the arguments presented in the 1978 report against "radical" reform of the administrative hearings system was that this could be done only after careful evaluation and analysis of state agency procedures.[290] Nonetheless, taken together, the individual recommendations offer suggestions for reform from reconsideration through the Appeals Council with relatively little conflict or overlap.

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[282] 1 CFR §305.78-2(b). *See also* 1978 Report, *supra* note 277, at 86.

[283] The demonstration projects were mandated by Congress in the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460 §6, 98 Stat. 1794 (1984). The year before Congress had responded to criticism of existing procedures for terminating disability benefits--in particular the Social Security Administration's system for continuing disability reviews--by requiring states to give claimants the option of an evidentiary hearing as part of the reconsideration procedures used in all continuing review cases. *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). These procedures are discussed at text accompanying notes 35-40, *supra*.

[284] *See* 1 CFR §305.87-6.

[285] *See* 1987 Appeals Council Report, *supra* note 279, at 5. ("The magnitude of the current caseload, and the Appeals Council's efforts to dispatch it with diligence and compassion, defy effective management.")

[286] *Id.*, at 90, n.220. The remaining cases were cases pending in federal district court, which must be reviewed and processed by the Appeals Council, and remands ordered by a federal court.

[287] As stated in the report, "the Appeals Council as an institution fails to achieve the goals identified for it, and fails any more to contribute very much to their pursuit by other bureaucratic units." *Id.*, at 209.

[288] *See* 1 CFR §305.87-7.

Rather than discuss each set of recommendations separately, the significant recommendations included in all three sets of recommendations will be presented together below by matching specific recommendations to the three levels of the current administrative appeals process. Thus, recommendations relating to reconsideration from the 1987 state agency study will be presented first. These will be followed by recommendations on administrative hearing procedures from the 1978 study and the 1987 state agency study. This material is broken down further into three subcategories: prehearing procedures, hearings procedures, and post-hearing procedures. Then, recommendations on the Appeals Council from the 1978 and 1987 Appeals Council studies will be discussed. Finally, the major recommendations from all three sets of recommendations will be compiled together and presented as a model for reform of the Social Security administrative appeals process.

A. Pending Recommendations

Although most of the Administrative Conference's specific recommendations address particular aspects of the Social Security Administration's administrative appeals process, a few general recommendations directed at the process as a whole were made as well. Thus, the Conference recommended in 1978 that the Social Security Administration "devote more attention to the development and dissemination of precedent materials."[291] It was suggested, as examples, that the Administration codify "settled or established policies" by regulation, follow a policy of "reasoned acquiescence or nonacquiescence" in judicial decisions, and publish "fact-based precedent decisions."[292] Although not directed at a particular level in the administrative appeals process, this recommendation was intended for decisionmakers and administrators with authority over decisionmakers.[293] An even more broadly stated general recommendation in 1978 supported the continuation of "an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence."[294]

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[289] *See* 1987 State Agency Report, *supra* note 278, at 55.

[290] *See* 1978 Report, *supra* note 277, at 86.

[291] Recommendation 78-2, *supra* note 276, at (C)(2).

1. Reconsideration

The Administrative Conference supported the implementation of demonstration projects on the use of personal interviews with claimants at both the initial decision level and on reconsideration.[295] As part of this process, the Conference recommended in 1987 that the Social Security Administration evaluate the current use of evidentiary hearings in continuing disability review cases as well as the results of the demonstration projects in making its report to Congress.[296] The recommendations themselves take no position on the use of face-to-face procedures at the state agency level; however, the report accompanying the recommendation states that the procedures "appear quite promising."[297] Recognizing that budgetary constraints may make full implementation of face-to-face procedures for all disability claims impossible, the Conference did suggest that it might be appropriate to hold interviews only in selected cases based on guidelines that consider the evidence in the record, the medical condition involved in the claim, and the opinion of the examiner processing the case whether a personal interview "would be of significant assistance to the ultimate determination."[298]

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[292] *Id. See also* 1978 Report, *supra* note 277, at 110-12. Specific recommendations for publication of precedent decisions by the Appeals Council were made in 1987. *See* text accompanying note 333, *infra*.

[293] Thus, as part of the same recommendation it was suggested that periodic conferences be held with administrative law judges to discuss "new legal developments or recurrent problems." Recommendation 78-2, *supra* note 276, at (c)(2). Similar suggestions were made in the Conference's 1987 recommendations directed specifically at the Appeals Council. *See* Recommendation 87-7, *supra* note 279, at (1)(f).

[294] Recommendation 78-2, *supra* note 276, at (C)(3).

[295] *See* text accompanying notes 278, 283-84 , *supra*.

[296] Recommendation 87-6, *supra* note 278, at (1). The Conference also recommended delaying full implementation of any reforms in the use of evidentiary hearings or personal interviews at the initial or reconsideration stages until the publication of a final report on the demonstration projects by the Department of Health and Human Services. *Id.*, at (2).

[297] 1987 State Agency Report, *supra* note 278, at 54.

[298] Recommendation 87-6, *supra* note 278, at (3).

The Administrative Conference has not recommended that the reconsideration stage be abolished. Instead, it has recommended that a cautious approach be followed once the report is made on the pending demonstration projects: "[c]lose scrutiny should be given to any legislative or other proposals to completely eliminate the reconsideration stage, taking into account the impact of that step on overall processing costs, and on the caseload at the ALJ stage."[299] To the extent that any proposals are considered which would combine the initial and reconsideration stages into a single initial decision procedure, the Conference recommended that the Social Security Administration consider the need for including a face-to-face procedure along the lines authorized in the demonstration projects.[300]

2. Administrative Hearing

The Administrative Conference has made a large number of recommendations relating to the conduct of administrative hearings, most of which form the core of the 1978 recommendations. A few of these recommendations apply generally to the administrative hearing process; others are directed to prehearing procedures, the conduct of the administrative hearing itself, or post-hearing procedures.

The first recommendation from the 1978 study was that the Social Security Administration continue to use administrative law judges to decide disability appeals, and that administrative law judges hearing those appeals continue to be appointed in conformity with the Administrative Procedure Act.[301] It was found that the major criticisms of using administrative law judges in disability hearings--that hearings become too formal, the process becomes too costly, and a sufficient number of qualified administrative law judges cannot be recruited--were unfounded. Rather, the use of independent administrative law judges was found to be more important than had been the case earlier in the program's history: "As the Social Security system comes under increasing fiscal pressure, and the pressures of a rising caseload, a less clearly independent corps of deciders would have greater difficulty resisting the 'institutional imperatives' to reduce both the effort expended on individual cases and the number of awards."[302]

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[299] *Id.*, at (7).

[300] *Id.*

[301] Recommendation 78-2, *supra* note 276, at (A)(1). The Administrative Procedure Act and its application to Social Security disability appeals are discussed at text accompanying notes 352-57, *infra*.

[302] 1978 Report, *supra* note 277, at 89.

The Administrative Conference supported administrative law judge independence despite the recognition that it results in some loss of agency control. An evaluation of current practice in the report accompanying the 1978 recommendations revealed that a proper balance had been struck at the Social Security Administration between honoring the independence of its administrative law judges and asserting appropriate control over policy and productivity.[303] Accordingly, along with its recommendation supporting continued use of independent administrative law judges, the Conference also recommended that the Office of Hearings and Appeals should, "consistent with the administrative law judge's decisional independence, . . . prescribe procedures and techniques for the accurate and expeditious disposition of . . . claims."[304]

a. Prehearing Procedures

The Administrative Conference made a number of recommendations in 1978 aimed at improving the process for developing evidence at the administrative hearing level. In the study leading to the recommendations, it was found that hearings are extremely important for the development of evidence relating to claimants' functional limitations and residual capacities for work, and that it would be helpful to compile as much evidence as possible before the hearing to make the most effective use of the hearing to complete the development of the record.[305] Without precluding post-hearing development, the Conference therefore recommended that administrative law judges develop the record at the prehearing stage of the process "whenever sound discretion suggests that such development is feasible and useful."[306] It was noted in the report accompanying the recommendation that post-hearing development was common, and that proper questioning at the hearing was often limited due to a lack of necessary background medical evidence in the file. As a result, the hearing becomes a less effective means for the development of a full and complete record.[307] The recommendation itself notes, along similar lines, that although sometimes evidence can be obtained only after the hearing has been held, "prehearing development often may be necessary for an informed and pertinent exchange at the hearing."[308]

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[303] Thus, the report concluded that "[o]n balance the current tension between individualized determination by independent ALJs, and management's desires to expedite the process and hold down costs seems healthy." *Id.*, at 89. With respect to policy, the report notes that the agency can require judges to follow rules and regulations designed to produce the types of substantive decisions it would itself hope to produce, and that "none of [the Bureau of Hearings and Appeals'] current actions interferes with decisional independence properly understood." *Id.*, at 91.

[304] Recommendation 78-2, *supra* note 276, at (A)(2). The recommendation goes on to note that "[m]aintaining the administrative law judge's decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration's fulfillment of statutory duties." *Id.*

[305] *See* 1978 Report, *supra* note 277, at 92-93.

[306] Recommendation 78-2, *supra* note 276, at (B)(1).

A second aspect of fact development addressed in the Administrative Conference's 1978 recommendation was the use of medical evidence supplied by claimants' treating physicians, both as independent sources and as supplemental sources when evidence is supplied by consulting physicians. The Social Security Administration's practice at the time was found to favor the use of consulting physicians over treating physicians, despite advantages of getting information from the physician with a regular relationship with the claimant, based at least in part on the perception of administrative law judges that treating physicians' reports tend to be biased in favor of claimants.[309] Notwithstanding these concerns and other concerns expressed about the quality of treating physician reports, the Conference recommended more effective use of treating physicians as sources of medical evidence, including the use of standard questionnaires to obtain necessary information from treating physicians.[310] Recognizing that information obtained from a treating physician may conflict with other medical evidence in the record, particularly reports from consulting physicians, the recommendation goes on to suggest that claimants be given the opportunity to have their treating physician respond in writing to any conflicting evidence.[311]

The Conference also recommended that better use be made of claimants as sources of relevant information. It was found that claimants were rarely relied upon to assist in the development of medical evidence, at least in part because they were usually not given sufficient information about the issues in dispute to be of much help.[312] Therefore, it was recommended that claimants be provided notice of the reasons given by the state agency for denying benefits, and notice of the "critical issues" that will be addressed at the hearing.[313]

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[307] *See* 1978 Report, *supra* note 277, at 94.

[308] Recommendation 78-2, *supra* note 276, at (B)(1).

[309] *See* 1978 Report, *supra* note 277, at 94. ("ALJs rather consistently believe that consulting physicians are less biased and more expert than treating physicians, although the latter have a decidedly better opportunity to observe the claimant")

[310] Recommendation 78-2, *supra* note 276, at (B)(3).

[311] *Id. See also* 1978 Report, *supra* note 277, at 95. (Treating physician "is in a much better position to evaluate the consultative examiner's report and, in light of those findings, to supplement or explain his prior statements, than anyone else in the system.")

[312] *See id.*, at 96.

Finally, the Conference recommended the experimental use of prehearing interviews on a more regular basis, citing two main purposes to be served by such procedures. First, prehearing interviews would improve the development of necessary evidence. Second, they would increase the likelihood of granting benefits in appropriate cases without a full hearing.[314] The recommendation went on, however, to note that "[d]ue regard should be paid to the convenience of the claimants and to the need for a suitable record for such interviews."[315] The actual gathering of evidence could be done by a hearing assistant or staff attorney, rather than the administrative law judge.[316]

b. Hearing Procedures

The Administrative Conference made only one specific recommendation in 1978 directed at the actual conduct of administrative hearings: that administrative law judges engage in "careful and detailed questioning of the claimant at the hearing."[317] As stated in the accompanying report, judges vary considerably in the amount and quality of their questioning, but should "tend toward the more intensive end of the spectrum of [administrative law judge] practice."[318] As part of its 1987 recommendations concerning the use of personal interviews in state agency determinations, the Conference offered some support for the current role of the administrative hearing in the Social Security Administration's administrative appeals process. Thus, it was noted that the Administration "should proceed with caution" on the issue of whether the opportunity for an interview or a hearing at the state agency level should supplant the adjudicatory hearing before an administrative law judge. The Conference's position was that any such modifications to the initial and reconsideration process instead "should be seen as a possible way of reducing the number of appeals to the later stages of the process."[319] As part of the same set of recommendations, the Conference recommended that the evidentiary record should not be closed until the administrative hearing process has been completed, noting that the administrative hearing stage is the point at which claimants are most likely to be represented.[320]

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[313] Recommendation 78-2, *supra* note 276, at (B)(4).

[314] *See id.*, at (B)(2). *See also* 1978 Report, at 94.

[315] Recommendation 78-2, *supra* note 277, at (B)(2). Concern about the use of preliminary interviews to develop evidence was also expressed in the report: "this information could be elicited briefly and informally in advance of the hearing, although to avoid subsequent controversy, a suitable record should be kept of what transpires at the prehearing interview." 1978 Report, *supra* note 277, at 93.

[316] *See id.*

[317] Recommendation 78-2, *supra* note 276, at (B)(4). There were also a number of recommendations directed at the use of official notice and the questioning of vocational experts. *See id.*, at (B)(5), (B)(6). Most of the concerns raised have been addressed with the promulgation of the Medical-Vocational Guidelines in 1978. *See* 1978 Report, *supra* note 277, at 99-107.

[318] *Id.*, at 97.

c. Post-Hearing Procedures

The Administrative Conference addressed two issues relating to post-hearing development of evidence as part of its 1978 recommendations. First, the Conference recommended that any new evidence obtained after the administrative hearing record is closed be offered to the administrative law judge as a request to reopen the record.[321] Second, recognizing that in some cases evidence will have to be developed after the hearing, the Conference recommended that claimants should not be requested to waive their rights to examine evidence submitted after the hearing.[322] Although claimants rarely comment on post-hearing evidence, the report accompanying the recommendation found the practice of requesting a waiver, followed by some administrative law judges, to be "highly objectionable."[323]

3. Appeals Council

The Administrative Conference issued a set of comprehensive recommendations addressed at the Appeals Council in 1987. Only one of its earlier recommendations touched on Appeals Council procedure. Thus, the

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[319] Recommendation 87-6, *supra* note 278, at (6).

[320] *Id.*, at (9). *See also* 1987 State Agency Report, *supra* note 278, at 56. ("The record should not be closed at any point before a hearing stage at which claimants are likely to be represented by attorneys. At the moment, this is the ALJ level.") The report goes on to note that a shift to a single due process hearing at the state agency level, as opposed to a full administrative hearing before an administrative law judge, would present serious problems unless attorneys would represent claimants at the Disability Determination Services; in order to avoid "a significant tilt in the system against claimants," efforts would have to be made to encourage representation at the Disability Determination Services "such as transfer of hearings to be close to attorney offices, increased file availability to attorneys, routine photocopying of files, or something even more radical such as an entirely different manner of representing claimants at the DDS level." *Id.*

[321] Recommendation 78-2, *supra* note 276, at (C)(1). In 1987, the Conference recommended that evidence submitted improperly to the Appeals Council be presented to the administrative law judge in a petition to reopen. *See* notes 327-28, *infra*. Apparently this was also the intention in the 1978 recommendation. *See* 1978 Report, *supra* note 277, at 110.

[322] Recommendation 78-2, *supra* note 276, at (B)(7).

[323] 1978 Report, *supra* note 277, at 108.

Conference recommended in 1978 that Appeals Council review should be limited to the record developed by the administrative law judge; new evidence offered at the Appeals Council level should be accepted into the record on appeal "only if a refusal to do so would result in substantial injustice or unreasonable delay."[324] As stated in the accompanying report, "the Appeals Council should, save in exceptional circumstances, limit itself to the correction of errors of law and, in that effort, to the enunciation of principles to guide subsequent cases."[325] Since that recommendation was published, Congress and the Social Security Administration have imposed greater restrictions on the introduction of new evidence at the Appeals Council level.[326] In a footnote to its 1987 Appeals Council recommendations, the Conference stated that the Council should receive new evidence only upon a showing of good cause; otherwise, cases with new evidence should be remanded to the administrative law judge, and cited the 1978 recommendation.[327] The purpose behind this recommendation was to encourage complete fact development at the administrative hearing stage and to return the issue of new evidence back to the administrative law judge whenever possible, thereby limiting Appeals Council review to closed records.[328]

The central recommendation of the Administrative Conference's 1987 study of the Appeals Council was to shift the Council's emphasis from reviewing all appeals from administrative hearing decisions to performing a more effective policy-making role in the adjudication of disability claims.[329] As stated in the accompanying report, "the Appeals Council would function principally in a 'systems reform' capacity, attempting to discover, elaborate, and implement changes in the entire disability adjudication system that could lead to better, earlier decisionmaking."[330] In order to accomplish this goal, the Conference recommended giving the Council discretion to refuse to review most petitions, limiting itself to cases that would allow it to rule on issues of general importance.[331] Three types of cases were suggested in the report as suitable for Appeals Council review: cases involving new and potentially difficult issues, cases involving issues known to be difficult or problematic, and a certain number of cases selected at random.[332] With a reduced caseload, the Appeals Council would concentrate on issuing general interpretations on questions of procedure and "adjudicatory principles" in the form of minutes, and would publish precedential opinions in selected cases. The Appeals Council would have to select from even its reduced caseload to identify opinions suitable for publication as precedential decisions.[333] These minutes and opinions would be indexed, distributed widely at the Social Security Administration, and made available to the public.[334]

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[324] *See* Recommendation 78-2, *supra* note 276, at (C)(1). As part of the same recommendation, it was recommended that evidence submitted after the hearing should be submitted to the administrative law judge as a request to reopen the decision. *See* text accompanying note 321, *supra*. The recommendation does not address the difference between having evidence admitted by the Appeals Council to review an administrative law judge's failure to reopen following a request made to the administrative law judge, and including evidence as part of a substantive appeal. In the former circumstance the result would necessarily be a remand by the Appeals Council; if the evidence is part of the substantive appeal presumably the Appeals Council could remand or consider the evidence itself.

[325] 1978 Report, *supra* note 277, at 110.

[326] *See* text accompanying notes 170-75, *supra*.

[327] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(4), n.2.

[328] *See* 1987 Appeals Council Report, *supra* note 279, at 241 (notwithstanding some hardship to claimants who cannot assemble all of the evidence in time for the administrative hearing, "orderly litigation, and a respect for the finality of administrative judgments, suggest the importance of segregating the trial-level and the appellate-level functions more strictly.")

[329] *See* Recommendation 87-7, *supra* note 279, at (1).

Other recommendations were intended to improve the quality of Appeals Council review of those individual cases selected for review, including more collaborative work on cases by members of the Appeals Council and greater participation by claimants representatives in briefing and arguing important issues raised by the appeals.[335] Other specific recommendations on procedures for individual reviews included issuing opinions with better reasoning and legal analysis,[336] and avoiding the substitution by Appeals Council members of their judgment on factual determinations for those of the administrative law judges.[337]

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[330] 1987 Appeals Council Report, *supra* note 279, at 223.

[331] Recommendation 87-7, *supra* note 279, at (1)(b). The idea is to retain review of individual cases as an important, but not dominant, part of the Council's work: "the cases (although far fewer of them) are still the primary input into the operation of the Appeals Council, but the primary output of the organization becomes 'clarification of policies' or 'ideas for change,' rather than simply a mass of correct individual adjudications." 1987 Appeals Council Report, *supra* note 279, at 223-24. A caseload of 5,000 to 10,000 was suggested as appropriate, being both manageable and a sufficiently large number to keep the Council from becoming "just another policy body divorced from the reality of the adjudication process." *Id.*, at 227.

[332] *See id.*, at 228-32.

[333] Thus, while recognizing that most disability cases are too fact-specific to warrant publication, the 1987 report urges that the Appeals Council "seek [forward-looking decisions], and seize the opportunity to promote uniformity by advertising throughout the system any common, successful approaches to the cases." *Id.*, at 233.

[334] Recommendation 87-7, *supra* note 279, at (1)(a)(2). The Conference also recommended that the Council increase its visibility by "seeking publication of precedent by a recognized reporter service." *Id.*, at (1)(f). *See also* 1987 Appeals Council Report, *supra* note 279, at 234 ("the Appeals Council should look for opportunities to make its decisions worthy of publication, and ought to distribute far more of them far more widely.")

[335] *See* Recommendations 87-7, *supra* note 279, at (1)(c)(1), (1)(c)(2). The recommendation also contemplated the possibility of interested parties filing *amicus* briefs. *Id.*, at (1)(c)(2).

The 1987 recommendations also addressed the workload and staffing of the Appeals Council. Thus, the Conference recommended that efforts be made to reduce the time required to grant or deny review,[338] and, once the time period for review had passed, to allow for the reopening of claims only under existing standards.[339] In order to improve the status of the Appeals Council, the Conference recommended reducing the number of members, improving the selection process, and upgrading salary levels and civil service protection for Appeals Council members.[340] Although not stated in the recommendation, the accompanying report states that Appeals Council members should have the same Administrative Procedure Act guarantees of independence provided to administrative law judges.[341] Finally, the Administrative Conference recommended that if the Appeals Council does not prove to be effective in its new role, then the Social Security Administration should consider whether it should be abolished.[342]

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[336] *Id.*, at (1)(c)(3). *See also* 1987 Appeals Council Report, *supra* note 279, at 238. ("We look forward to the Appeals Council drafting opinions that--even if not rivaling the federal judiciary in length or diversity--are at least clear, responsive, forward-looking and individualized enough to be free of mindless boilerplate.")

[337] Recommendation 87-7, *supra* note 279, *supra* note 279, at (1)(c)(4). Although not addressed directly in the recommendation, the accompanying report notes that the "substantial evidence" standard of review for fact determinations tends to be either ignored or interpreted as a license to reconsider the entire factual record. Accordingly, it is suggested in the report, but not included in the Conference's recommendation, that the Council use an "arbitrary" standard for determinations of fact in place of the "substantial evidence" standard. See 1987 Appeals Council Report, *supra* note 279, at 240.

[338] The report suggests 30 days for deciding whether to grant review, and then another 60 days to decide the case. *Id.*, at 242.

[339] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(5), (1)(c)(6). As stated in the accompanying report, "[t]he Appeals Council should not . . . be empowered to reopen a case merely because it has missed the ordinary deadline for review--only factors such as fraud, clerical error, or obvious mistake should disturb the finality of the decision." 1987 Appeals Council Report, *supra* note 279, at 242-43.

[340] Recommendation 87-7, *supra* note 279, at (1)(d). With respect to salary, the recommendation was to upgrade Appeals Council members' salary level to one level above that of Social Security Administration administrative law judges. *Id.* The report suggests limiting memberships to eleven. 1987 Report, *supra* note 279, at 248.

[341] *Id.*, at 247. The report also suggested that the Council be made a separate component within the Office of the Commissioner, but the Conference did not make this recommendation. *See id.*, at 249.

B. Model for Administrative Appeals Based on Pending Administrative Conference Recommendations

A model for reform of the Social Security Administration's administrative appeals process can be derived from the pending recommendations of the Administrative Conference. This model would reduce the levels of administrative action to three: initial determinations, administrative hearing and Appeals Council review. There would be significant changes in the initial determination process to compensate for the elimination of the reconsideration level of review, limited changes at the administrative hearing level and a substantial shift in emphasis in the work of the Appeals Council.[343] In addition to specific changes in the administrative appeals process, a model based on the Administrative Conference's recommendations would operate under certain general principles for adjudications, most of which amount to fine tuning of current policies and practices.

Reforms supported by pending Conference recommendations would consist of the following:

> 1. Add an optional face-to-face interview at the initial decision level and eliminate reconsideration.[344]

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[342] Recommendation 87-7, *supra* note 279, at (2). The option of abolishing the Appeals Council outright was considered in the report accompanying the 1987 recommendations. *See* 1987 Appeals Council Report, *supra* note 279, at 210-15. The report concluded "the Appeals Council can not continue as it is; if the recommended improvements [included in the formal recommendations] are not promptly forthcoming, or if they prove inefficacious, then the Appeals Council ought to be abolished." *Id.*, at 215.

[343] Thus, the Conference's 1978 recommendations concentrating on administrative hearings proposed interstitial and conservative suggestions, whereas the 1987 recommendations on the Appeals Council offered far more radical suggestions for change. *See* text accompanying notes 280-82, 285-88, *supra*.

[344] The Conference has not made a formal recommendation to this effect; however, support for this change in procedures can be found in the Conference's 1987 recommendations on state agency determinations, which were limited by the fact that the Social Security Administration was still conducting demonstration projects on the use of personal interviews as part of the process for initial decisions and reconsideration. *See generally* text accompanying notes 295-302, *supra*.

> 2. Increase efforts at prehearing development of records, including more effective use of treating physicians and claimants as sources of medical evidence.[345]
>
> 3. Encourage greater use of prehearing interviews in order to improve the development of records and identify appropriate cases for granting of benefits without a full hearing.[346]
>
> 4. Require that claimants request a reopening of the administrative hearing record if they wish to submit new evidence obtained after the administrative hearing record is closed.[347]
>
> 5. Allow claimants to present new evidence to the Appeals Council only for good cause. If good cause cannot be shown, claimants would be required to request a reopening of the administrative hearing record from the administrative law judge.[348]
>
> 6. Limit Appeals Council review of individual claims to discretionary review, and concentrate its efforts on a policy-making role through the issuance of generally applicable interpretations of law and procedure and the publication of precedential opinions in selected cases.[349]

IV. SOCIAL SECURITY ACT AND ADMINISTRATIVE PROCEDURE ACT

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[345] *See* text accompanying notes 305-313, *supra*. Although this recommendation was directed at the administrative hearing level, logically the recommendation for greater use of treating physicians and claimants as sources of medical evidence would apply to the initial decision level as well.

[346] *See* text accompanying notes 314-316, *supra*.

[347] *See* text accompanying note 321, *supra*.

[348] *See* text accompanying notes 324-28, *supra*.

[349] *See* text accompanying notes 329-334, *supra*. As part of this recommendation, certain suggestions for improving the quality of review by the Appeals Council of cases selected for review would be included. *Id*.

PROVISIONS RELATING TO ADMINISTRATIVE APPEALS PROCESS

Both the Social Security Act[350] and the Administrative Procedure Act[351] set forth requirements for administrative appeals that apply to Social Security disability adjudications. The Social Security Act contains general rules of procedure applicable to administrative determinations and administrative appeals in disability claims for both Disability Insurance Benefits, including claims by disabled survivors, and Supplemental Security Income.[352] The Administrative Procedure Act itself does not require a hearing on any issue before an agency; it applies only when another substantive statute prescribes a hearing on the record.[353] Therefore, in order for the Administrative Procedure Act's requirements for the conduct of adjudications and the status of administrative law judges to apply to Social Security disability claims, they must do so by virtue of the fact that the Social Security Act requires the determination of disability claims "on the record after opportunity for an agency hearing."[354]

The Supreme Court declined to decide whether the hearing requirements of the Administrative Procedure Act apply to Social Security disability claims when the issue was raised in *Richardson v. Perales*.[355] However, applicability seems clear. Indeed, Social Security disability hearings in which an administrative law judge makes findings of fact and conclusions of law and then decides eligibility for benefits would seem to be the very model of a decision based on a record after a hearing, which triggers application of the

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[350] *See* 42 U.S.C. §§401-433 (Chapter 7, Subchapter II: Federal Old-Age, Survivors, and Disability Insurance Benefits) (1982 & Supp. IV 1986).

[351] *See* 5 U.S.C. §§551-559 (Chapter 5, Subchapter II: Administrative Procedure) (1982 & Supp. V 1987); *id.* §§1305, 3105, 3344, 5372, 7521 (provisions relating to administrative law judges).

[352] 42 U.S.C. §§405, 1383(c).

[353] *See* United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 756-57 (1972); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 385-86 (8th Cir. 1966).

[354] The Administrative Procedure Act applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. §554(a); the Social Security Act provides that a claimant dissatisfied with an initial decision must be given the opportunity for a hearing and a decision on the basis of evidence presented at the hearing. *See* 42 U.S.C. §§405(b)(1), 1383(c)(1).

[355] 402 U.S. 389 (1971). The Court stated that "[w]e need not decide whether the APA has general applicability to Social Security disability claims, for the Social Security administrative procedure does not vary from that prescribed by the APA." *Id.*, at 409.

Administrative Procedure Act.[356] Courts have assumed applicability in other contexts, such as the independence of administrative law judges and official notice.[357] Other provisions of the Administrative Procedure Act unrelated to administrative appeal procedures, such as those governing rulemaking, also apply to Social Security disability claims.[358]

The relevant provisions of the two acts will be discussed separately below. Although bound by the requirements of both acts, the Social Security Administration has implemented rules and regulations with respect to most of the areas covered by the Administrative Procedure Act that equal or exceed the statutory requirements. It has also implemented the relevant provisions of the Social Security Act. To the extent that the Administration has promulgated rules and regulations which exceed the requirements of the Administrative Procedure Act, it is bound to follow its own, more stringent procedural requirements.[359] Accordingly, presently most of the requirements in the Administrative Procedure Act are not applicable directly to Social Security disability adjudications. However, the Social Security Administration is bound by those requirements in the sense that it cannot rescind or modify its rules and regulations if to do so would establish procedures that conflict with the Administrative Procedure Act.

A. Administrative Procedure Act Requirements

There are provisions in the Administrative Procedure Act which touch upon most aspects of the Social Security Administration's administrative appeals process. Most generally, the Act requires publication of rules of procedure in the Federal Register.[360] Also, the Act authorizes agencies to issue their own rules for compliance with the requirements of the Act.[361] The significant specific requirements for adjudications relevant to Social Security disability claims cover notice, the conduct of administrative hearings, the status of administrative law judges, the decisionmaking process, and post-hearing review.

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[356] *See* IT&T Corp. v. AFL-CIO, 419 U.S. 428, 443-44 (1975). Even without the words "on the record" in the Social Security Act, the Administrative Procedure Act would still apply under current practices. *See* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) ("[w]hether the formal adjudicatory hearing provisions of [the Act] apply to specific administrative processes does not rest on the presence or absence of the magical phrase 'on the record,'" but rather on the "substantive character of the proceedings included.")

[357] *See, e.g.*, Nash v. Bowen, 869 F.2d 675, 679 (2d Cir. 1989); Rives v. Schweiker, 684 F.2d 1144, 1154 n.10 (5th Cir. 1982).

[358] *See* 5 U.S.C. §553. This is true notwithstanding the exemption for rules relating to grants and benefits in *id*. §553(a)(2), because the Social Security Administration has waived the applicability of the exemption. *See* Buschmann v. Schweiker, 676 F.2d 352, 356 n.4 (9th Cir. 1982). The Act does not apply, however, to "interpretive" rules issued by the Social Security Administration. *See, e.g.*, Guadamuz v. Bowen, 859 F.2d 762, 771 (9th Cir. 1988).

[359] *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974).

1. Notice

The Act requires that parties receive notice of hearings which include the time, place and nature of the hearing, the authority under which the hearing is to be held, and a statement of the factual and legal issues that will be addressed.[362] The notice must include all disputed matters of law, and the agency may not change the matters in dispute without giving the parties involved reasonable notice of the change.[363] Moreover, the scope of the hearing and the final decision must be based on the coverage identified in the notice.[364] Parties not given proper notice are not bound by the decision.[365]

2. Conduct of Administrative Hearing

The Administrative Procedure Act includes a number of specific requirements for the conduct of administrative hearings applicable to Social Security disability claims. Although these requirements are substantial, they fall short of requiring all of the procedures applicable to judicial proceedings.[366] Thus, parties are given the right to submit evidence and present arguments supporting their claim for benefits.[367] They can appear by themselves, or with a lawyer or "other duly qualified representative."[368]

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[360] 5 U.S.C. §§552(a)(1)(C), 553(b).

[361] *Id.* §559.

[362] *See id.* §554(b). *See also* Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). With respect to the time and place of hearings, the Act specifies that "due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. §554(b).

[363] *See* Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968).

[364] 5 U.S.C. §554(c)(2). There is an exception if the matter is resolved otherwise by consent which, in the context of disability benefits, has little meaning except perhaps for an agreement on contested dates of disability.

[365] *See, e.g.*, NLRB v. Tennsco Corp., 339 F.2d 396, 399 (6th Cir. 1964).

[366] *See* Alesi v. Cornell, 250 F.2d 877, 879 (9th Cir. 1958).

[367] 5 U.S.C. §554(c)(1).

[368] *Id.* §555(b).

Any oral and documentary evidence can be submitted, subject only to rules on relevance, materiality and undue repetition.[369] Evidence is not limited to that which would be admissible in a judicial proceeding.[370] In addition to evidence supporting their claim for benefits, claimants are entitled to submit rebuttal evidence and to "conduct such cross examination as may be required for a full and true disclosure of the facts."[371] However, an agency may require that all or part of the evidence supporting a claim for money or benefits be submitted in written form "when a party will not be prejudiced thereby."[372] The Act gives claimants the right, in other words, to present their case and to be heard.[373] The person conducting the hearing cannot consult anyone on a "fact issue" unless notice of the consultation is provided and all parties are given the opportunity to participate.[374] If "official notice" of a fact not in the record is to be considered in making a decision, the parties must be allowed to respond and dispute that fact.[375]

The Act also includes a number of hearing procedures which the person presiding at a hearing is authorized to use, subject to rules published by the appropriate agency. Thus, a Social Security administrative law judge is authorized under the Act to administer oaths, subpoena witnesses, take or authorize the taking of depositions, hold prehearing conferences for purposes of settlement or simplification of the issues, rule on matters of proof and evidence, dispose of procedural requests, control the conduct of the hearing, issue recommended decisions, and take any other action authorized by the Social Security Administration that is also consistent with the Administrative Procedure Act.[376] The Act requires a written explanation of the denial of any written request regarding a procedural matter.[377] The record compiled for the decision, including a transcript of the testimony and copies of all exhibits and other papers filed, must be made available to parties at cost.[378] Also, *ex parte* communications between persons outside the agency and the person conducting the hearing are prohibited.[379]

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[369] *Id.* §556(d).

[370] *See* McKee v. United States, 500 F.2d 525, 528 (Ct. Cl. 1979) ("In an administrative hearing, 'rank hearsay' not only is admissible, . . . but [it] can constitute substantial evidence if sufficiently convincing to a reasonable mind.")

[371] 5 U.S.C. §556(d).

[372] *Id.* §556(d).

[373] *See* Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471, 475 (4th Cir. 1953).

[374] *See* 5 U.S.C. §554(d)(1).

[375] *Id.* §556(e).

[376] *Id.* §556(c).

[377] *Id.* §555(e). There is an exception when the decision either affirms a prior denial or is "self explanatory." *Id.*

[378] *Id.* §556(e).

3. Status of Administrative Law Judges

The Administrative Procedure Act requires that hearings be held by either the agency itself, members of the "body which comprises the agency," or an administrative law judge or panel of administrative law judges appointed by the agency under the general congressional grant of authority for the appointment of administrative law judges.[380] If the hearing is conducted by someone other than the agency, such as an administrative law judge, the initial decision must be made by that person unless agency rules require that the entire record be submitted to the agency for the agency to make the decision.[381] In any event, the person conducting the hearing must be the person who decides the claim at that level, whether in the form of an initial decision or a recommended decision to the agency.[382] Also, the person making the decision at the hearing must be independent from anyone in the agency responsible for investigation or prosecution.[383] Therefore, the agency may not "infringe on the decisional independence of [administrative law judges] . . . [so that the] administrative hearing [can] 'be conducted in an impartial manner.'"[384] An administrative law judge is expected to act in an impartial and disinterested manner.[385]

The Act also provides certain protections to maintain the independent status of administrative law judges. Although appointed by the agency,[386] if needed, administrative law judges from one agency can be assigned temporarily to another.[387] Their pay is prescribed by the Office of Personnel Management under Civil Service rules.[388] Moreover, a personnel action against an administrative law judge can be taken only according to rules prescribed by the Merit Systems Protection Board and after a hearing before the Board.[389] Both the Office of Personnel Management and the Merit Systems Protection Board have been given authority to promulgate regulations in accordance with these responsibilities.[390]

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[379] *Id.* §§557(d)(1)(A)-(B). The Act also includes certain remedial steps to be taken if such communications occur. *Id* §§557(d)(1)(C)-(E).

[380] *Id.* §556(b). The purpose of this requirement is "to limit conduct of hearings and reception of evidence to specially qualified persons who are to be an essential part of the administrative adjudicatory process." U.S. Health Club, Inc. v. Major, 292 F.2d 665, 666 (2d Cir. 1961). Authority for the appointment of administrative law judges is at 5 U.S.C. §3105.

[381] *Id.* §557(b).

[382] *Id.* §554(d). There is an exception if the person conducting the hearing is "unavailable." *Id.*

[383] *Id.* §554(d)(2).

[384] Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (quoting 5 U.S.C. §556(b).

[385] *See* 5 U.S.C. §556(b); NLRB v. Tamper, Inc., 522 F.2d 781, 789-90 (4th Cir. 1975). *See also* Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (administrative law judge needs to be impartial to satisfy due process requirements).

[386] *See* note 380, *supra.*

[387] 5 U.S.C. §3344.

4. Decisionmaking Process

The Administrative Procedure Act states that the proponent of an order has the burden of proof, unless the allocation of burden is provided otherwise by statute.[391] The decision must be based on the whole record and "supported by and in accordance with the reliable, probative, and substantial evidence."[392] The decisionmaker must, of course, weigh the evidence, and the Act has been interpreted as contemplating a preponderance-of-the-evidence standard of proof for administrative hearings.[393] In contrast, the standard of review that an appellate court applies on an appeal from the administrative hearing is the "substantial evidence" test.[394] Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[395] The record for decision is limited to the testimony at the hearing, exhibits, and all other papers and requests filed during the course of the hearing.[396] The Act also requires that an agency confine itself to the record in making adjudicatory determinations.[397] Therefore, an agency may not consider evidence outside the record if that evidence causes "substantial prejudice."[398] However, an agency may allow new evidence to be submitted after the record has been closed so long as the claimant has ample opportunity to cross examine witnesses or otherwise rebut the new evidence.[399] Before a decision is made at the hearing, parties must be given a reasonable opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions, together with a statement supporting the proposed findings and conclusions or exceptions. In addition, any proposed findings and conclusions or exceptions, and a ruling on them, must be included in the record.[400]

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[388] *Id.* §5372. Thus, "[a]dministrative law judges . . . are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings." *Id.*

[389] *See id.* §7521. ("An action may be taken against an administrative law judge . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.") *See generally* Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. New. Eng. L. Rev. 593 (1984).

[390] 5 U.S.C. §1305.

[391] *Id.* §556(d). *See generally* Bosma v. USDA, 754 F.2d 804, 810 (9th Cir. 1984) (burden of proof defined as burden of going forward with evidence).

[392] 5 U.S.C. §556(d).

[393] *See* Steadman v. SEC, 450 U.S. 91, 99-100 (1980), *rehearing denied*, 451 U.S. 933 (1981). *See also* Fischer and Porter Co. v. United States International Trade Commission, 831 F.2d 1574, 1580-81 (Fed. Cir. 1987) (applying the *Steadman* case and its standard of proof to patent infringements); Sea Island Broadcasting Corp. of South Carolina v. F.C.C., 627 F.2d 240, 243 (1980). ("The use of the 'preponderance of evidence' standard is the traditional standard in . . . administrative proceedings.")

[394] *Steadman*, 450 U.S. at 100.

[395] Universal Camera Corp. v. NLRB, 340 U.S. 470, 477 (1951). This is the same standard enunciated under the Social Security Act. *See* text accompanying note 434, *infra*.

Hearing decisions must be made a part of the record and must include findings and conclusions on all "material issues of fact, law, or discretion presented on the record," a statement of the reasons and bases for the findings and conclusions, and a statement of the relief awarded or denied.[401] The Act requires agencies to decide cases in light of all the evidence on the record, and to give reasons for their decisions consistent with applicable law.[402] An agency must articulate its findings and the reasons for its decision clearly and precisely.[403] When an initial decision is made by the person presiding at the hearing, that decision must become the final decision of the agency unless there is an appeal from or review of the decision by the appropriate administrative review body within applicable time limits.[404]

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[396] 5 U.S.C. §556(e).

[397] *Id.*

[398] *See* Marathon Oil Co. v. E.P.A., 564 F.2d 1253, 1265 (9th Cir. 1977) (quoting United States v. Pierce Auto Freight Lines, 327 U.S. 515, 528 (1946). *See also* Dotson v. Peabody Coal Co., 846 F.2d 1134, 1138 (7th Cir. 1988). ("It is unfair and irrational for the trier of fact to rely on evidence outside the record [because] . . . such evidence cannot be challenged by opposing counsel.")

[399] *See* In re Three Mile Island Alert, Inc., 771 F.2d 720, 731 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). The same requirement has been found in the Social Security Act. *See* note 430 and accompanying text.

[400] 5 U.S.C. §557(c).

[401] *Id.*

[402] *See* United Auto Workers v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972).

5. Post-Hearing Review

The Administrative Procedure Act also includes one provision relating to post-hearing review by the agency. When an appeal from or review of a hearing decision is made, the agency in its review of that decision has all of the powers that it would have had if it made the original decision; however, the agency may limit the issues on appeal or review by notice or by rule.[405] As with hearing decisions, before a decision is made on appeal from or review of a hearing decision, parties must be given the opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions.[406]

B. Social Security Act Requirements

Titles II and XVI of the Social Security Act includes provisions governing procedures used to determine eligibility for all of the disability programs covered by the Act.[407] Thus, there are a number of provisions applicable to administrative appeals which include specific requirements for reconsideration determinations, administrative hearings and Appeals Council review; in addition, certain requirements related to initial determinations and judicial review have an impact on the administrative appeals process. The Act also provides the Secretary with authority to promulgate rules and regulations governing the processing of claims, including the taking and furnishing of evidence to establish eligibility for benefits.[408] This authority has been construed as conferring "exceptionally broad authority to prescribe standards for applying certain section of the [Social Security] Act."[409]

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[403] *See* Nader v. NRC, 513 F.2d 1045, 1051 (D.C. Cir. 1975). A recitation of conclusions without a showing of supporting facts is ineffectual. Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 379 (7th Cir. 1969); Deaton, Inc. v. ICC, 693 F.2d 128, 131 (11th Cir. 1982). In *Deaton*, the court noted that an agency determination could be upheld if the basis for its decision could be discerned from the opinion. 693 F.2d at 131. *See also* Benmar Transport & Leasing Co. v. FCC, 623 F.2d 740, 741 (2d Cir. 1980). ("Despite an agency's failure to include in its decision a statement of findings and conclusions and reasons or basis therefor on all material issues of fact, law or discretion presented on the record, court of appeals is not disposed to overturn a sound administrative decision if the agency's path--although not ideally clear--may reasonably be discerned.")

[404] 5 U.S.C. §557(b). The initial decision for these purposes means "the first decision after evidence has been taken." Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965).

[405] 5 U.S.C. §557(b).

[406] *Id.* §557(c). Parties can also file a supporting statement, and the proposed findings and conclusions or exceptions must be included in the record together with the agency's ruling. *Id.* *See* text accompanying note 400, *supra*.

[407] Title II of the Act governs the Old Age, Survivors and Disability Insurance Benefits program, which includes the Disability Insurance Benefits program for disabled wage earners, as

The Act gives the Secretary of the Department of Health and Human Services general authority to decide individual claims for disability benefits.[410] The actual determination of disability, however, is made by state agencies under contract with the Social Security Administration. The authority for state agency determinations of disability is based on a request by the state to assume that responsibility, which all states have chosen to do.[411] State agencies are required to make disability determinations in accordance with relevant regulations and other guidelines promulgated by the Social Security Administration.[412] This authority to regulate state agencies is extensive, and includes the agency's administrative structure, staffing arrangements, performance criteria and fiscal control procedures.[413]

1. Notice

The Secretary's authority to decide, with the assistance of state agencies, individual claims for benefits includes the responsibility for providing certain

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well as programs for disabled widows, widowers and children of wage earners. *See* 42 U.S.C. §§401-433. Title XVI governs the Supplemental Security Income program, including benefits on the basis of disability. *See id.* §§1381-1384.

[408] *See id.* §405(a):The Secretary should have full power and authority to make rules and regulations and to establish procedures . . . which are necessary or appropriate to carry out [the provisions of the Act], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the methods of taking and furnishing the same in order to establish the right to benefits hereunder.*See also id.* §1383(d)(1).

[409] Heckler v. Campbell, 461 U.S. 458, 466 (1983) (quoting Schweilar v. Gray Panthers, 453 U.S. 34, 43 (1981)).

[410] 42 U.S.C. §405(b)(1).

[411] *See id.* §421(a). The Secretary has authority to monitor state agency performance and, if necessary, take over the responsibility from a state following notice and hearing. *Id.* §421(b). The same procedures apply to Supplemental Security Income disability determinations. *See id.* §1383b.

[412] *Id.* §421(a)(2).

[413] *Id.*

notice. Thus, any determination unfavorable to a claimant must include with the decision "a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based."[414] A decision must meet these requirements for clarity and specificity in order to have *res judicata* effect.[415]

2. Reconsideration

The Secretary's authority to make initial determinations includes the authority to establish a procedure for reconsidering initial decisions upon request from a claimant.[416] The only detailed requirements in the Act related to reconsideration procedures applies to cases where benefits are terminated based on a finding that the claimant is no longer disabled.[417] In such cases, claimants must be given the opportunity for an evidentiary hearing at the reconsideration level on the issue of disability.[418] The hearing, which must be "reasonably accessible" to the claimant, can be held by the state agency or by the Social Security Administration if the termination decision was made by a state agency; it must be held by the Administration if it made the termination decision itself. If the hearing is held by the state agency, it must be conducted by an adjudicatory unit separate from the unit which made the decision to terminate benefits; if held by the Administration, it must be conducted by someone other than the person who made the termination decision.[419]

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[414] *Id.* §405(b)(1). *See also id.* §1383(c)(1). As stated in Heckler v. Day, 467 U.S. 104, 117 (1984), the Act requires "that every initial determination of ineligibility contain an easily understandable discussion of the evidence and the reasons for the determination."

[415] *See* Rogerson v. Secretary, 872 F.2d 24, 28-29 (3d Cir. 1989).

[416] The Act does not authorize reconsideration as such; authority is found in the regulations. *See* 20 CFR §§404.907-.913. There are, however, extensive requirements authorizing and, under certain circumstances requiring, review of state disability decisions on the Secretary's own motion. *See generally* 42 U.S.C. §421(c).

[417] A finding that a claimant is no longer disabled is to be distinguished from a determination based on eligibility requirements unrelated to disability, such as insured status.

[418] *Id.* §405(b)(2). This provision does not apply to Supplemental Security Income claims; however, the Administration has extended it to that program by regulation. *See* 20 CFR §416.1414-.1422.

[419] 42 U.S.C. §405(b)(2).

3. Administrative Hearing

The Social Security Act entitles claimants to a hearing following an adverse determination on a disability claim.[420] A hearing is required with respect to all issues for which the claimant's individual circumstances are relevant to the determination. On the other hand, a hearing is not required with respect to issues that can be resolved through the application of properly promulgated regulations.[421] Also, a second hearing is not required when a case is remanded for further administrative proceedings, even when the remand is based on a failure to consider certain medical evidence.[422] Hearings are required on an appeal from an adverse decision on eligibility; however, a refusal to reopen a previous application is not a "decision" for these purposes and therefore a hearing is not required.[423]

To a certain extent, the provisions of the Social Security Act applicable to disability appeals track the relevant provisions of the Administrative Procedure Act. The Supreme Court addressed this point in *Richardson v. Perales*,[424] after declining to decide whether the Administrative Procedure Act applies generally to Social Security disability claims:

> We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social

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[420] *Id.* §§405(b)(1), 1383(c)(1). These two provisions, which apply to Disability Insurance Benefits under Title II and Supplemental Security Income under Title XVI, are "substantially identical." *See* Pulido v. Heckler, 568 F.Supp. 627, 628 (D. Colo. 1983), *rev. on other grounds*, 758 F.2d 503 (10th Cir. 1985). The right to a hearing applies equally to decisions by state agencies and by the Social Security Administration. *See* 42 U.S.C. §421(d) ("any individual dissatisfied with any determination [by a state agency] . . .shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. §405(b)] with respect to decisions of the Secretary.")

[421] Thus, in Heckler v. Campbell, 461 U.S. 458 (1983), the Supreme Court upheld the practice of making eligibility determinations according to the Social Security Administration's Medical-Vocational Guidelines: "It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. . . . [E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." *Id.*, at 467.

[422] *See* Pagan v. Secretary, 819 F.2d 1, 4 (1st Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 713 (1988) (administrative law judge reconsidered evidence on remand without a hearing and again denied claim).

[423] *See* Califano v. Sanders, 430 U.S. 99, 108-09 (1977).

[424] 402 U.S. 389, 408-09 (1971).

> Security Act. . . . The cited [5 U.S.C.] §556(d) provides that any documentary evidence "may be received" subject to the exclusion of the irrelevant, the immaterial, and the unduly repetitious. It further provides that a "party is entitled to present his case or defense by oral or documentary evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts" and in "determining claims for money or benefits . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."
>
> These provisions conform, and are consistent with, rather than differ from or supercede, the authority given the Secretary by [42 U.S.C. §§405(a), (b)] "to establish procedures," and "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits," and to receive evidence "even though inadmissible under rules of evidence applicable to court procedure." Hearsay, under either Act, is thus admissible up to the point of relevancy.

Nonetheless, these separate provisions of the Social Security Act should be discussed, as well as other provisions with or without counterparts in the Administrative Procedure Act.

Upon request by a claimant, the Social Security Administration must provide to the claimant "reasonable notice" and the opportunity for a hearing.[425] When a hearing is requested and held, the hearing decision must be based on the evidence presented and compiled at the hearing.[426] The Act also requires that a hearing be held within a reasonable period of time.[427] However, in light of the fact that Congress has never imposed specific time limits for processing Social Security disability appeals, the Supreme Court has held that "it would be an unwarranted intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims."[428]

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[425] 42 U.S.C. §§405(b)(1), 1383(c)(1).

[426] *Id.* The hearing must be requested within sixty days after receipt of notice of the adverse determination. *Id.*

[427] *See* White v. Mathews, 559 F.2d 852, 859 (2d Cir.), *cert. denied*, 435 U.S. 908 (1977). In a later case, the Secretary acknowledged this timeliness requirement. *See* Heckler v. Day, 467 U.S. 104, 111 (1984). ("The Secretary does not challenge her the determination [by the lower court] that [42 U.S.C.] §405(b) requires administrative hearings to be held within a reasonable time.")

The Act confers on the Secretary authority to hold hearings at which the person conducting the hearing can administer oaths, examine witnesses and receive evidence.[429] Claimants must also be given the opportunity to cross-examine adverse witnesses and, if evidence is obtained by the administrative law judge after the hearing, must be allowed not only to review and comment upon that evidence but also to subpoena and cross-examine the source of the evidence.[430]

The formal rules of evidence are not to be applied at these hearings: "Evidence may be received at any hearing . . . even though inadmissible under the rules of evidence applicable to court procedure."[431] Not only can hearsay evidence be admitted, but an adverse determination can be based on hearsay evidence alone, including written medical reports, so long as the claimant has the opportunity to subpoena and cross-examine the source of the evidence.[432] Although the Act states only generally that hearing decisions must be based on the evidence compiled at the hearing, a substantial evidence standard for hearing decisions is written into the provision authorizing judicial review. Thus, only findings of fact supported by substantial evidence are considered conclusive for purposes of judicial review.[433] This "substantial evidence" standard has been defined by the Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[434] Courts have also required administrative law judges to set forth in their decisions the evidence supporting their decisions, and evidence being discounted.[435] Decisions with insufficient detail have been found to violate the Act's requirement for clear and understandable determinations.[436]

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[428] Heckler v. Day, 467 U.S. at 119. *See also* Littlefield v. Heckler, 824 F.2d 242, 246-47 (3d Cir. 1987) (rejecting arguments on delay based on the Social Security Act and the Administrative Procedure Act, citing *Day*. Supplemental Security Income hearing decisions must be made within ninety days, except for claims requiring a determination of disability. 42 U.S.C. §1383(c)(2).

[429] 42 U.S.C. §§405(b)(1), 1383(c)(1).

[430] Thus, in Richardson v. Perales, 402 U.S. 389, 402 (1971), the Court upheld the use of written medical reports in Social Security disability hearings, recognizing that claimants have the right to subpoena and cross-examine the physician who authorized the report. *See also* Wallace v. Bowen, 869 F.2d 187, 192 (3d Cir. 1989). ("We construe *Richardson* as holding that an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled under . . . 42 U.S.C. §405(b).") *Wallace* involved the use of post-hearing evidence, and the court concluded that "it is unmistakable under the statute that the Secretary may not rely on post-hearing reports without giving the claimant an opportunity to cross-examine the authors of such reports, when such cross-examination may be required for a full and true disclosure of the facts." *Id.* *See also* Allison v. Heckler, 711 F.2d 145, 146 (10th Cir. 1983). ("An ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or rebut the report"); *id.* at 147 ("Moreover, such practice exceeds the Secretary's statutory authority. The Secretary is clearly mandated by statute to determine a claimant's disability 'on the basis of evidence adduced at hearing'") (quoting 42 U.S.C. §405(b)(1)).

[431] 42 U.S.C. §§405(b)(1), 1383(c)(1).

[432] *See* Richardson v. Perales, 402 U.S. at 402 ("a written report by a licensed physician . . . may be received as evidence in a disability hearing and, despite its hearsay character . . . may constitute substandard evidence supportive of a finding . . . adverse to the claimant, when the claimant has not exercised his right to subpoena [and cross-examine] the reporting physician.")

The provisions of the Social Security Act governing judicial review also affect the extent to which records are closed at the administrative hearing level. Thus, the Act provides that additional evidence cannot be submitted in support of a claim on judicial review. If a claimant or the Social Security Administration wants to submit additional evidence to the court, the court can only remand the case for further administrative action.[437] Moreover, the court is authorized to remand a case under such circumstances only if the new evidence is "material" and if there was "good cause" for the claimant or the Administration to have failed to introduce the new evidence at the hearing, or, if appropriate, to the Appeals Council.[438]

4. Appeals Council

The Act does not include separate requirements for Appeals Council review. However, a number of the important requirements relating to proof at the administrative hearing level apply equally in those cases which proceed to the Appeals Council. Thus, Appeals Council decisions must be supported by substantial evidence.[439] Similarly, any evidence that could have been submitted to the Appeals Council would be subject to the limitations on submitting additional evidence on judicial review.[440]

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[433] 42 U.S.C. §405(g). *See also id.* §1383(c)(3) (applying §405(g) to Supplemental Security Income claims).

[434] Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 302 U.S. 197, 229 (1938). The substantial evidence standard of 42 U.S.C. §405(g) has been described as "precisely the same" as the standard of the Administrative Procedure Act. *See* Ginsburg v. Richardson, 436 F.2d 1146, 1148 (2d Cir.), *cert. denied*, 402 U.S. 976 (1971).

[435] *See, e.g.*, Stephens v. Heckler, 766 F.2d 284, 287 (7th Cir. 1985) ("the ALJ must mention and discuss, however briefly, uncontradicted evidence that supports the claim for benefits.") *Cf.* Zalewski v. Heckler, 760 F.2d 160, 166 (7th Cir. 1985) (require only "a minimal level of articulation by the ALJ as to his assessment of the evidence . . . in cases in which considerable evidence is presented by the claimant.")

[436] *See, e.g.*, Vasquez v. Heckler, 736 F.2d 1053, 1054 (5th Cir. 1984) (failure to state basis for a required finding violates 42 U.S.C. §405(b)(1)). *See generally* text accompanying notes 414-15, *supra*.

[437] 42 U.S.C. §405(g).

[438] *Id.*

V. SUMMARY AND RECOMMENDATIONS

A. SUMMARY

One can see from the material presented in parts II and III of this report that there are a number of alternatives to the structure of the Social Security Administration's administrative appeals process which may be of some use in considering recommendations for reform. There are, of course, reasons for many of the differences in administrative appeals procedures found in other federal disability programs which would counsel against adopting those different procedures for the Social Security Administration.[441] Nonetheless, certain aspects of the administrative appeals process used in other programs do provide some interesting possibilities that could be considered for the Social Security program.

The most significant ways in which the administrative appeals process differs in other federal disability programs from that used by the Social Security Administration can be summarized broadly, together with the major suggestions for change recommended by the Administrative Conference of the United States in previous reports.[442] It will be most helpful to present this summary material according to the different steps of the appeals process found generally in all programs: administrative review prior to hearing, administrative hearing, and final administrative review. This material is also presented in the form of charts in appendices to this report. There is a series of charts (Appendix A) showing the flow of the administrative appeals process for each program considered in this report. In addition, a separate chart (Appendix B) shows the major features of the process for all programs in an effort to facilitate comparative analysis.

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[439] The judicial review provision relating to substantial evidence discussed at text accompanying note [old IV 76], *supra*, applies to "[t]he findings of the Secretary," which includes Appeals Council determinations. *See id.*

[440] *See* text accompanying note 437, *supra*.

[441] Most obviously, there are significant differences in the disability standard applied in all of the other programs included in this report, except for the Railroad Retirement program. Thus, procedures beneficial to a determination of the presence of pneumoconiosis in a Black Lung claim, which may also require the participation of a third-party coal mine operator, may have little meaning for adjudicating Social Security disability claims.

[442] The Administrative Conference's recommendations are summarized in a different format in Section IV(B) of this report, *supra*.

1. Administrative Review Prior to Hearing

Procedures used in other disability programs to review decisions prior to a hearing are quite similar to those used by the Social Security Administration. One difference is that reconsideration in the Civil Service disability program is limited to the record compiled for the initial application. Another difference, found in the Veterans and Black Lung programs, is to give the claimant the option of seeking reconsideration or proceeding directly to an administrative hearing. A separate reconsideration step is not required by the Administrative Procedure Act or the Social Security Act.[443] The Administrative Conference has made some recommendations that contemplate the elimination of reconsideration in Social Security cases.

In most programs, reconsideration takes place following the completion of a separate process for initial determinations. In the Black Lung program, however, the reconsideration procedure is in effect an optional extension of the initial decision process. Claimants are provided an initial decision which identifies deficiencies in the record and invites the claimant to submit the missing evidence rather than request an administrative hearing. If new evidence is submitted, then a new decision is made much like a reconsideration decision in the Social Security program.

There are also differences in the format in which reconsideration decisions are communicated to claimants.[444] For most programs the notice is similar to that used by the Social Security Administration, in which a brief rationale is included covering any new evidence submitted as part of the reconsideration process. A more elaborate notification procedure is used in the Black Lung program in which a proposed decision and order is submitted to the claimant who may request a revision of particular findings of fact and conclusions of law.

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[443] There is a requirement for a "disability hearing" in the Social Security Act for certain cases which is to take place at the reconsideration level. *See* text accompanying notes 418-19, *supra*.

[444] Generally, the format used for reconsideration-type decisions is the same as used for initial decisions. The initial decision process is discussed in part II of this report. *See* text accompanying notes 14-31, *supra*.

2. Administrative Hearings

The general model for administrative hearings is very similar for all programs included in this report. The Social Security Act and the Administrative Procedure Act clearly require that claimants be given the opportunity for a *de novo* hearing before an independent administrative law judge following an adverse decision on a claim for disability benefits. The most common differences relate to the requirements for initiating the appeal. Thus, a request for a hearing in the Civil Service disability program must include a statement of the basis for the appeal and the Office of Personnel Management must then respond with an admission, denial or explanation of the allegations in the petition. Although Civil Service hearings are *de novo* and new evidence is considered, evidence submitted to prove an entirely new basis for disability can be excluded. Hearing procedures for Veterans claims also utilize a more elaborate procedure for initiating the process. Claimants file a Notice of Disagreement, which is responded to by the filing of a Statement of the Case by the Administration including a summary of the law, regulations and evidence relevant to the claim. As with Civil Service hearings, there are certain limits on the submission of new evidence which was available but not submitted during the initial decision process. Moreover, in Black Lung appeals the issues at the hearings are limited to those identified in the initial decision or raised during the initial decision process, except for issues that could not have been reasonably ascertained at that time.

Hearings at the Veterans Administration are unusual in that they can be requested either during the initial decision process or only after an initial decision has been made. In practice, most hearings are requested only after the initial decision is made. In such cases, the claimant must file a Notice of Disagreement from the Notice of Decision. The content of the Notice of Disagreement need not be specific so long as it indicates the claimant's desire for a review of the decision. The department then responds to the Notice of Disagreement by reviewing the initial decision, and may develop additional evidence as part of this process. Then, if it decides to affirm the initial decision, it must issue a Statement of the Case which includes a justification for the decision in sufficient detail to allow the claimant to prepare an effective appeal.

Another major difference in the Black Lung program is that the administrative hearing is fully adversarial. This explains some of the formality in the procedures used to frame issues on appeal. Civil Service disability claims are also considered adversarial; however, the Office of Personnel Management does not pursue these claims aggressively. Prehearing conferences are used regularly in Civil Service cases to frame issues and, when possible, resolve matters without a hearing. The Administrative Conference has recommended more extensive use of prehearing conferences and better development of medical evidence prior to hearings by Social Security Administration administrative law judges.

3. Final Administrative Review

The Merit Systems Protection Board and the Benefits Review Board provide significantly more limited review of Civil Service and Black Lung claims than is the case with the Social Security Administration's Appeals Council. Although the rules are softened somewhat in practice, the Merit Systems Protection Board reviews decisions only when new and material evidence is presented that was not available when the hearing record was closed or if there was an error in interpreting applicable law. Similarly, the Benefits Review Board reviews decisions by administrative law judges according to a substantial evidence standard, without receiving any new evidence, or to determine whether the decision is consistent with applicable law. The Administrative Conference has recommended that the Social Security Administration's Appeals Council move in this direction, limiting itself to review on the record of only selected cases raising important and difficult issues.

Hearings before the Board of Veterans Appeals are entirely different. Additional documentary evidence can be presented, and hearings are held at which witnesses are allowed to testify. Moreover, the Board has the authority to request an expert medical opinion from an independent medical expert in order to clarify the record.

Some programs require claimants to follow relatively formal steps to initiate a post-hearing administrative appeal. Thus, appeals to the Benefits Review Board are initiated by filing a written notice of appeal followed by a petition for review which must identify specifically the substantive issues involved in the appeal. The issues raised must be supported by a written memorandum or other statement, and the Board will generally not consider any issue not raised and briefed adequately by the party raising the issue. Appeals to the Board of Veterans Appeals also require the filing of a Substantive Appeal from a Statement of the Case issued following an adverse initial or reconsideration decision. A Substantive Appeal must identify all of the issues which the claimant wishes to raise; however, in practice this requirement is construed liberally.

The Merit Systems Protection Board and the Benefits Review Board publish precedential decisions which are distributed widely. The Administrative Conference has recommended that the Appeals Council do the same. By contrast, decisions of the Board of Veterans Appeals are specifically not precedential, and are available by mail on request.

B. RECOMMENDATIONS

It is apparent from the material presented in this report that certain improvements can be made in the Social Security Administration's administrative appeals process. Obviously, the Administration felt that some significant changes would be valuable when it prepared its extensive revisions draft in 1988.[445] The testimony and other evidence presented to the Disability Advisory Committee has confirmed this view. Presumably, the Disability Advisory Committee will present the Administration with extensive and detailed proposals for revising at least certain aspects of the administrative appeals process.

It is beyond the scope of this report to present comprehensive and detailed recommendations for reform. The Administrative Conference noted in its 1978 Recommendations that radical change in the Social Security Administration's appeals process was not warranted at that time. This remains true to a large extent today, except, perhaps, with respect to the Appeals Council. The present process is an open and informal one, consistent with the beneficient purposes of the Social Security Act. Although some more control may be needed over the flow and quality of appeals, too much structure could prove to be counterproductive, particularly for unrepresented claimants. Indeed, if the process becomes too formal, the participation of nonattorney representatives may have to be restricted or even precluded.[446] However, certain broad and general recommendations can be presented based on the practice in other federal disability programs and the prior reports and recommendations of the Administrative Conference in this area. All of the recommendations which follow are consistent with applicable provisions of the Social Security Act and the Administrative Procedure Act.

Recommendation No. 1: Establish a single initial decision procedure to replace the current two-step process of initial decision and reconsideration.

Although all programs include some process for reconsidering initial decisions prior to an administrative hearing, most invest significantly less time and resources to the reconsideration stage than does the Social Security Administration. In some programs, reconsideration is an optional step; in one program reconsideration is effectively an extension or continuation of the initial decision process. On balance, it seems that a separate, formal reconsideration process as used by the Social Security Administration is unnecessary. Instead, the resources used to implement the reconsideration level of review could be allocated more effectively to improving the initial decision process. It is not sufficient, however, simply to eliminate reconsideration. At a minimum, the types of changes in the initial decision process presented in the next two recommendations should be made in order to justify this change.

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[445] *See* Social Security Administration Draft Proposed Rules, *supra* note 2.

[446] Nonattorney claims representatives are worried about this in the Veterans program with the advent of the Court of Veterans Appeals and the loosening of attorney fee restrictions in Veterans benefits cases.

> **Recommendation No. 2: Add an optional face-to-face interview with the claimant as part of a revised initial decision process.**

Most programs provide for a face-to-face interview with a decisionmaker only at the administrative appeals level, as does the Social Security Administration. One program does allow claimants to request a hearing as part of the initial decision process, although most claimants choose to wait to have a hearing only after an initial decision is made. Nonetheless, such an interview would be extremely helpful in improving the quality of initial decisions and thereby reducing the number of claims appealed to the administrative hearing level. It is on this basis that the Administrative Conference has supported the implementation of face-to-face procedures in its contingent recommendations on state agency action.

> **Recommendation No. 3: Improve the development of medical and vocational evidence during a revised initial decision process by increasing communication between staff and claimants on the progress of the application, including the face-to-face interview.**

All programs encounter the problem of trying to make a disability determination on the basis of records which all too often are incomplete. Claimants are advised of the reasons for adverse decisions, but only one program provides claimants with notice of a potential adverse determination before the decision becomes final. Claimants should be informed when an adverse decision is likely and should be told specifically of any deficiencies in the record that led to the preliminary adverse determination. This could be done either in writing or in conjunction with a face-to-face interview. When it appears that a claim is likely to be denied on the basis of insufficient medical information, every effort should be made to complete the medical record before a final decision is reached. Medical staff should participate directly in this process of communication by seeking supplemental medical evidence and clarification of existing evidence from claimants and, when possible, from appropriate medical sources.

Recommendation No. 4: Improve the quality of formal initial decisions.

A formal written decision including a statement of reasons and facts supporting the decision is required in all programs. However, the quality and detail of notices is, all too often, less than optimal; most notices are far less clear and informative than they can and should be. Every effort should be made to include as much relevant information as possible in the initial decision in order to allow the claimant to make an intelligent decision whether to appeal and, if the claimant decides to appeal, to be able to prosecute the appeal.

Recommendation No. 5: Improve the process for development of supplemental evidence at the administrative hearing level, including routine collection of updated medical reports from relevant medical sources.

All programs allow and encourage the submission of additional evidence during the administrative hearing level of appeal. The only significant limitations relate to the submission of technical evidence in the Black Lung program. Since gathering of additional evidence is such an important part of the administrative hearing process, the Social Security Administration should increase its efforts to obtain supplemental evidence obviously relevant to the appeal such as current progress reports from known medical sources. Special efforts should be made to obtain current information from the claimant's treating physician. In cases where the medical evidence appears to be particularly voluminous or complex, administrative law judges should be allowed to use medical experts to assist in deciding whether further medical development is needed.

Recommendation No. 6: Increase the use of prehearing conferences to frame the issues involved in the hearing, stipulate matters not in dispute, and decide appropriate cases without hearings.

Prehearing conferences are not used regularly in most programs; however, when they are used they are found to be very effective. Depending on the agenda for the conference, staff attorneys could be used instead of administrative law judges. Any matters of substance discussed at the prehearing conference should be included in the record. Although use of prehearing conferences should be encouraged, they should not be mandatory. Judges and claimants should be given the option to implement the goals of a prehearing conference by letter or telephone, when appropriate. If prehearing conferences are to be used more regularly, the Administration must provide additional funding and staff to support this activity which, in turn, could result in lower expenditures later in the process.

Recommendation No. 7: Improve the effectiveness of administrative law judges' subpoena power.

Although most judges conducting administrative hearings are authorized to issue subpoenas, they are generally hesitant to do so. Social Security Administration administrative law judges should be encouraged to issue and enforce subpoenas, and their authority to do so should be strengthened. In addition, administrative law judges should be required to issue subpoenas in certain situations, such as where important medical evidence cannot be located or obtained from a known medical source. Also, subpoenas should be issued whenever needed to obtain evidence to fill in gaps in the record identified at a prehearing conference.

Recommendation No. 8: Close the administrative hearing record at a set time after the evidentiary hearing.

All programs allow for unrestricted submission of evidence at a hearing and, in most instances, the opportunity to submit evidence after the hearing for a limited period of time. Although claimants should be encouraged, through the use of prehearing conferences and otherwise, to submit as much evidence as possible prior to or at the hearing, the evidentiary record should not be closed until claimants are given the opportunity to obtain and submit additional relevant evidence. Similarly, administrative law judges should be allowed to request additional evidence to be submitted after the hearing. Once the record is closed, however, additional evidence should be allowed into the record only under limited circumstances and upon request to the administrative law judge.

Recommendation No. 9: Improve the quality of hearing decisions.

Administrative hearing decisions should be written in a manner that communicates fully and effectively the basis for the decision, so that the claimant can make an informed choice as to whether to appeal. In some programs, claimants are required to specify the issues they wish to raise on an appeal from an administrative hearing decision. However, this type of requirement is enforced only in programs where the process is fully or partially adversarial. Even with improved administrative hearing decisions, requiring claimants to specify issues to be raised on appeal would be inappropriate for the Social Security program. Unrepresented claimants would be put at a severe disadvantage, and claimants' lawyers would be encouraged to file a comprehensive, and often overly comprehensive, list of objections in order to avoid problems of waiver.

> **Recommendation No. 10: Establish a procedure for petitioning administrative law judges to reopen or amend administrative hearing decisions within one year when there is new and material evidence available that relates to the period covered by the prior hearing.**

Although the record should be closed within a period of time set after the hearing, claimants should be given the opportunity to present new and material evidence obtained after the hearing record is closed, at least for a reasonable period of time such as one year. Claimants could be required to provide a reason why the evidence was not submitted earlier, in order to assure that evidence actually available at the time of the hearing was not withheld intentionally. The evidence would have to relate to the period covered by the original hearing record; otherwise, a new application should be filed.

It is preferable to have this evidence submitted to the administrative law judge who could determine if the evidence satisfies the new and material standard, rather than allow this evidence to be submitted at a subsequent level of administrative review. This "new and material evidence" standard should be construed liberally, so that claimants who make an effort to obtain and submit new evidence relevant to their claim will have the opportunity to have all relevant evidence considered. Any reasonable explanation as to why the evidence was not submitted earlier should be sufficient to allow reopening or amendment at this level; this requirement should be construed less strictly than the comparable requirement for submitting new and material evidence at the district court. If a claim is reopened or amended, a new decision would be made, with or without another hearing, and a new appeal period would be available to seek review at the Appeals Council.

> **Recommendation No. 11: Limit Appeals Council review to the record compiled at the administrative hearing level, unless the claimant seeks review of an administrative law judge's refusal to reopen the record for the submission of new and material evidence.**

In most programs, the final administrative review process is essentially a limited appellate review of the administrative hearing record and decision. When claimants are given every opportunity to present all relevant evidence at the hearing level and, if necessary, to submit additional evidence on a petition to reopen, there is no reason to require the Appeals Council to consider additional evidence. This recommendation is the logical counterpart to the previous recommendation. However, in addition, the Appeals Council could be given authority in exceptional cases to remand a claim for a hearing on a request to reopen even if the one year period for a petition to the administrative law judge has passed.

> **Recommendation No. 12: Authorize Appeals Council to use staff or lower level Council members to deny a request for review, and limit the review of cases by the Appeals Council to those raising significant policy issues.**

The Appeals Council cannot be expected to assume a meaningful individual review function for all claims that might be presented to the Appeals Council. In most other programs, the number of claims presented to the final administrative review level are significantly fewer, and even then most routine cases are simply denied the opportunity for full review. This recommendation tracks the central recommendations of the 1987 Administrative Conference recommendations on the Appeals Council.

> **Recommendation No. 13: Require Appeals Council to publish precedential opinions.**

The two most rigorous administrative review bodies involved in disability adjudications, the Merit Systems Protection Board and the Benefits Review Board, both publish widely available precedential opinions. The Appeals Council could do likewise if it limited its review function as suggested in the previous recommendation. This recommendation also tracks the 1987 Administrative Conference recommendation on Appeals Council opinions.

Report for Recommendation 90-5

Federal Agency Electronic Records Management and Archives

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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EXECUTIVE SUMMARY

A growing proportion of the universe of federal agency information is being created, processed, stored and retrieved in digital electronic form. The law of records management and preservation runs the risk of becoming increasingly obsolete unless it adapts to cover electronic information formats. So far, the policy setting and oversight agencies for records management and archives have had some time to work out appropriate long run approaches because of the feasibility of keeping paper documentation of official decisions. Now, however, the requirement to keep paper copies of electronic documents is increasingly an unsatisfactory solution because of the burdensomeness, the artificiality, and storage requirements. The use of electronic technologies makes it easier to implement appropriately designed records management and archives systems. On the other hand, it is important that the design of these systems not impede efficient use of existing and future technologies, and equally important that they not expect more of individual users of such technologies than is reasonable. Designing agency information systems to provide adequate records management capability implicates a tension between centralized and decentralized automation strategies that is pervasive in office automation. A good electronic records management program permits substantial amounts of user autonomy with respect to software selection and use patterns.

In the long run, the only significant threat to an historical record based on electronic formats is technological obsolescence--the possibility that future computer hardware and software would be unable to read files created with today's hardware and software. Mass electronic storage is not the problem; the problem is ensuring access to electronic information over periods exceeding thirty to forty years. Most people agree that the ultimate solution to the technological obsolescence threat is the development of appropriate information format standards for interchanging information. Such standards improve the integrity of the national archives, and also can improve the utility of information systems in everyday use.

This report reviews the legal environment, identifies the major questions presented by the shift to digital electronic information technologies, and develops a set of recommendations intended to shape conformity between an appropriate electronic records legal environment and emerging technologies.

I. Introduction

A. Viewpoint

More and more records of federal agencies are created, used, and stored in electronic rather than paper form. As this occurs, legal requirements and management efforts designed around paper records are progressively less satisfactory to ensure an adequate legal and historical record of government decisionmaking. Administrative Conference Recommendation 88-10[1] and the accompanying report address public access and dissemination of electronic information. The 88-10 effort considered statutes and policies that contemplate agencies releasing information they already have to the public.[2]

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[1] Federal Agency Use of Computers in Acquiring and Releasing Information (Recommendation 88-10), 54 Fed. Reg. 5207, 5209 (Feb. 2, 1989), to be codified at 1 CFR §305.88-10 [hereinafter "ACUS Recommendation 88-10"]; *See* H. Perritt, Electronic Acquisition and Release of Federal Agency Information (Oct. 1, 1988) (report); Perritt, *Electronic Acquisition and Release of Federal Agency Information: An analysis of ACUS recommendation*, 41 Admin. L. Rev. 253 (1989); Perritt, *Federal Electronic Information Policy*, 63 Temple L. Rev. 201 (1990).

[2] Information release can occur at three levels: access, disclosure, and dissemination. *See* ACUS Recommendation 88-10, glossary; Office of Management and Budget Circular A-130, 50 Fed.Reg. 52730 (Dec. 24, 1985). Circular A-130 distinguishes between "access" (§6(f)) and "dissemination" (§6(g)), and an appendix explains the distinction essentially the same terms as those used Recommendation 88-10. 50 Fed.Reg. at 52745 (Appendix IV to Circular A-130). *Access* is the lowest level, representing the most passive form of release. The agency must release information upon request but takes no affirmative steps to release information in the absence of a request. Paper information subject to access is kept in regular agency files and indexed and packaged for routine agency use; not for public availability. The ACUS recommendations use the term electronic access to refer to the lowest level of electronic release; the ability to obtain agency information through ad-hoc demands. Electronic access usually is accomplished by releasing bulk information on tapes or disks, in the format used by the agency. Information covered by the miscellaneous records provisions of the Freedom of Information Act, 5 U.S.C. §552(a)(3) (1982), but not by other release obligations is an example.

Disclosure is an intermediate level of release, involving some affirmative effort by the agency to make the information easily available to the general public. Regulatory dockets, SEC filings, and indices of adjudicatory decisions all are examples of information that is disclosed. Most agencies meet disclosure requirements by providing public reference rooms. Electronic disclosure involves making terminals and suitable retrieval software available in public reference rooms, and possibly at other fixed locations. The ACUS recommendations use the term electronic disclosure to refer to an intermediate level of electronic release; making information available electronically to the public at one or only a few places.

The recommendation and report also considered agency acquisition of information in electronic form. The 88-10 effort did not consider internal agency use of information in electronic form; nor did it consider the circumstances under which agencies should create electronic information systems or the characteristics of such systems.

This report complements the 88-10 effort. It focuses on internal agency electronic records management, and the preservation of electronic records for historical purposes.

The basic legal framework, explained in Part II, contemplates that agencies must retain certain records of public decisions so that there will be a historical record. As electronic technologies become the predominant means through which decisions are recorded, faithful application of the policies embodied in the records statutes requires assessment of whether electronic records should be treated the same or must be treated differently from paper records. This report also develops the idea, shared widely among information systems professionals, that the best way to ensure retention of electronic records having archival value is to design archival features into information systems in the first place. Accordingly, the report necessarily considers electronic information system design.

B. Relevance to Private Sector

It is erroneous to suppose that electronic records management and electronic archives management present issues solely of concern to creators and managers of government information. The private sector should be concerned with electronic records management issues for three reasons overlapping with

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The highest level of information release involves the most agency activity: *dissemination*. This involves a high degree of affirmative agency action actually to publish the information and to distribute it. The National Library of Medicine and the Federal Register are examples of this activity. The ACUS recommendations use the term electronic dissemination to refer to the highest level of electronic release; using electronic means to make information widely available to the public at places where it is used. Electronic dissemination involves making available dialup links or disks containing data structures and software for easy retrieval on small computers. Electronic publishing is the same thing as electronic dissemination.

The stages of added value, discussed in §IV(B)(2) of this report, elaborate on these three levels of value.

It is difficult technologically to draw clear lines among the three levels once information is computerized, (*See* ACUS Report §VI(C) explaining why) but the distinctions nevertheless are useful in evaluating policy options. Paragraph C of ACUS Recommendation 88-10 makes use of these three levels of release.

the subjects discussed in this report. First, the government imposes certain recordkeeping requirements on the private sector that may or may not be met by electronic recordkeeping strategies. Second, private entities want to maintain records for their own archiving and litigation support functions. Third, some of the same issues regarding reliability of official records kept in electronic form also are raised in connection with private electronic contracting methods.[3]

The federal government imposes diverse records keeping requirements on private sector entities, as aspects of economic regulation by the tariff regulatory agencies, as aspects of environmental and health and safety regulation and food and drug regulation, and regulations imposed on defense contractors.[4] OSHA requires that hazardous substance exposure record for employees be maintained for 50 or more years.[5] The same technologies that permit electronic archiving of government information also permit electronic maintenance of private sector information subject to governmental requirements. Most of the same policy issues concern both private and public information, and the same procedures that make sense for government records managers also may make sense for private sector records managers operating under governmental requirements.

Purely private incentives also raise electronic archiving issues for the private sector. Private sector entities have an incentive to maintain records in connection with potential litigation, such as medical records, OSHA-related hazardous substances records, and banking records.

A growing number of private and public entities are using electronic messages to make and administer contracts and to engage in other legally significant transactions. One important requirement for these electronic contracting systems is that reliable records of the transactions be maintained in the event of a dispute over whether the transaction occurred, whether a contract was formed, or over the terms of the contract.[6]

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[3] A growing number of private companies are using electronic messages to conduct commercial business affairs, for example electronic invoices and purchase orders exchanged directly between computers. These electronic contracting activities use a family of format standards developed by ANSI accredited standards organization X12 and commonly known as Electronic Data Interchange ("EDI.")

[4] *See Guide to Recordkeeping Requirements in the Code of Federal Regulations* (published by Office of the Federal Register, National Archives and Records Administration, as a guide to recordkeeping requirements that the federal government imposes on private identities).

[5] 29 CFR §1910.1001 (1988) (requiring employers to keep records of exposure to certain substances like asbestos for period of employment plus thirty years); 29 CFR §1910.1029 (1988) (requiring employers to keep records of employee exposure to coke oven emissions for 40 years, or period of employment plus 20 years, whichever is longer); 29 CFR §1910.20 (1988) (requiring employers to employee exposure and medical records for 30 years); 29 CFR §1904.2 (1988) (requiring employers to keep records of reportable occupational injuries and illnesses for five years). *See also* 29 CFR §1951.7 (1988) (permitting state agencies to keep certain OSHA mandated records in microform).

The issues regarding the rules of evidence and reliability discussed in Part IV(H) of this report are material to reliability concerns as to private sector electronic contracting.

C. Development of Report

1. Entities consulted

The author consulted the following interests:[7]

Office of Management and Budget
Staff of the House Committee on Government Operations
National Archives and Records Administration
Electronic information industry
Public interest groups
ASC X12 members and officers
Individual agencies

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[6] Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange--A Report*, 45 Bus. Law. 1645 (1990).

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II. Current Legal Environment

A. Institutional Responsibility

1. National Archives and Records Administration ("NARA")

The National Archives and Records Administration (NARA) was created by the National Archives and Records Administration Act of 1984[8] as an independent executive agency of the United States Government. NARA succeeds the National Archives Establishment, which was created by act of June 19, 1934.[9] The National Archives Establishment was subsequently incorporated into the General Services Administration (GSA) and renamed as the National Archives and Records Service by §104 of the Federal Property and Administrative Services Act of 1949.[10]

Under existing law, the Archivist of the United States has the authority to accept federal records and private materials that the Archivist has determined to have sufficient historical or other value to warrant their continued preservation by the United States Government. The Archivist then causes the transfer of accepted records[11] to the National Archives. As a general matter, the National Archives and Records Administration handles records according to agency instructions, subject to FOIA obligations imposed on NARA.[12]

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[8] 98 Stat.2280, 2295 (Oct.19,1984), amending 44 U.S.C. §2102 and following sections.

[9] 48 Stat. 1122-1124 (Jun. 19, 1934).

[10] 63 Stat. 377-403 (Jun. 30, 1949). *See generally* U.S. Government Manual, 1988-89, p. 612.

[11] A common term for the acceptance and transfer process is "accession."

[12] *See* 36 CFR §1250.16(b) (if NARA received request for records that are primary responsibility of another agency, NARA refers the request to the agency); 36 CFR §1228.198(a)

Only permanent federal records defined as such on an SF115 (request for records disposition authority) and approved by the Archivist, are transferred to the National Archives.[13] Records already deposited into the National Archives may be designated for transfer to educational institutions or associations.[14] The Archivist is authorized to promulgate regulations establishing procedures for preserving records.[15]

2. Agencies

Federal agencies work with the Archivist to determine what records will be deposited into the National Archives. Each agency has a records manager who is responsible for (1) inventorying all records in the agency, (2) proposing disposition instructions for approval by NARA, and (3) creating a comprehensive agency records disposition schedule. This schedule is submitted to NARA for approval.[16]

B. Statutes and Executive Orders

1. Disposal of Records Act

The Disposal of Records Act[17] authorized agencies to submit schedules of records[18] not currently needed "that appear to have no permanent value or historical interest"[19] to the Archivist, authorized the Archivist to report to a joint Congressional committee lists of records to be destroyed, and authorized agency heads to destroy records, as to which the joint committee had no

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(NARA will observe restrictions lawfully imposed on the use of records transferred from other agencies "to the extent that they do not violate 5 U.S.C. §552)."

[13] 36 CFR §1228.190.

[14] 44 U.S.C. §2107 (1989). This provision has been used only when institutions already had collections of federal records that were approved for deposit, and NARA allowed the records to remain where they were as "satellite archives."

[15] 44 U.S.C. §3302 (1988).

[16] 36 CFR §§1228.12 and 1228.2 (1988).

[17] 53 Stat. 1219-1221 (Aug. 5, 1939).

[18] Records was subsequently defined to include all "books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics . . . ." 57 Stat. 380-383 (July 7, 1943). 44 U.S.C. §3301 now defines records to include machine readable materials.

[19] 53 Stat. 1219 enacting clause.

objection.[20] Legislation enacted in 1940[21] authorized the destruction of records that have been microfilmed in accordance with technical standards developed by the National Bureau of Standards, and made the microfilm records admissible in evidence.[22] Legislation originally enacted in 1943[23] authorizes the Archivist to promulgate regulations establishing procedures for preserving[24] and disposing of records,[25] and requires agencies to submit records disposition schedules to the Archives, in accordance with Archives regulations.[26]

2. Executive Order 9784

Executive Order 9784[27] required agency heads to establish programs for effective management and disposition of agency records.

3. Federal Property and Administrative Services Act

The Federal Property and Administrative Services Act of 1949[28] transferred the National Archives Establishment to the General Services Administration,[29] and authorized the Administrator of General Services to obtain reports from federal agencies on records management and disposal practices, to "promote, in cooperation with the executive agencies, improved records management practices and controls . . . including the central storage or disposition of records not needed by . . . agencies for their current use" and to report to the Congress and to the Director of the Bureau of the Budget on the subject.[30]

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[20] id. §5.

[21] 54 Stat. 958-959 (Sep. 24, 1940).

[22] §2, 54 Stat. 958. 44 U.S.C. §3312 now makes "certified reproductions" admissible in evidence.

[23] 57 Stat. 380-383 (July 7, 1943), 44 U.S.C. §3302 (1988).

[24] Preservation was handled implicitly by authorizing the disposition of records not having "sufficient administrative, legal, research, or other value to warrant their further preservation." §3, 57 Stat. 380 (July 7, 1943).

[25] §2 (authorizing National Archives Council); 44 U.S.C. §3302.

[26] §3; 44 U.S.C. §___. Congressional involvement was deleted from the Act in 1970.

[27] Sep. 25, 1946.

[28] 63 Stat. 377-403 (June 30, 1949).

[29] Id. §104(a).

[30] Id. §104(c).

4. Federal Records Act

The Federal Records Act[31] authorized the Administrator of General Services to promote standards for improved records management[32] and to "establish standards for the selective retention of records of continuing value."[33] It required agency heads to develop records management programs, to preserve records "containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency,"[34] and to establish safeguards against removal or loss of records under regulations promulgated by the Administrator of General Services.[35] The Act authorized the Administrator to accept for deposit with the National Archives agency records determined by the Archivist "to have sufficient historical or other value to warrant their continued preservation . . . ."[36]

5. Federal Records Management Amendments of 1976

The Federal Records Management Amendments of 1976[37] reorganized and codified the records management statutory provisions,[38] to clarify the objectives of records management to include:

-- accurate and complete documentation of government policies and transactions

-- control of quantity and quality of government records

-- simplification of records management activities, emphasizing the prevention of unnecessary paperwork

-- judicious preservation and disposal of records[39]

Legislation enacted in 1978 made application of general records schedules to agencies mandatory.[40]

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[31] 64 Stat. 583-591 (Sep. 5, 1950), adding §§501-511 Federal Property and Administrative Services Act of 1949.

[32] §505(a), 64 Stat. 583.

[33] §505(b), 64 Stat. 583.

[34] §506(a), 64 Stat. 583.

[35] Id. §506(e).

[36] Id. §507.

[37] 90 Stat. 2723-2727 (Oct. 21, 1976).

[38] Id., revising 44 U.S.C. §§2901-2907, 3103.

[39] 44 U.S.C. §2902.

[40] 92 Stat. 1063 (Oct. 10, 1978), amending 44 U.S.C. §§1503 and 3303a(b).

6. National Archives and Records Administration Act

The National Archives and Records Administration Act of 1984[41] removed the National Archives from the General Services Administration and set it up as an independent establishment in the executive branch called "The National Archives and Records Administration."[42] The Act authorized the Archivist to issue regulations, and required agency heads to "issue such orders and directives as such agency head deems necessary to carry out such regulations,"[43] thus preserving the divided responsibility between the National Archives and individual agencies.

7. Presidential Records Act

The Presidential Records Act of 1978[44] establishes governmental ownership in presidential records, and obligates the President to implement records management controls to "assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory or other official or ceremonial duties are adequately documented."[45] The Act permits the President to dispose of presidential records no longer having "administrative, historical, information, or evidentiary value," but only if the Archivist of the United States has no objection, or over the objection of the Archivist if the President submits a schedule of records to be destroyed 60 days before the destruction.[46] Upon the conclusion of a Presidency, the Act makes the Archivist the custodian of the presidential records of the departing President, and obligates the Archivist to make the records available to the public, subject to restrictions on access imposed by the President under specific categories set forth in the Act.[47] The categories of authorized restrictions closely track FOIA exemptions.[48]

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[41] 98 Stat. 2280-2295 (Oct. 19, 1984).

[42] 44 U.S.C. §2102.

[43] 44 U.S.C. §2104 (a).

[44] 92 Stat. 2523 (Nov. 4, 1978), codified as amended by 98 Stat. 2287 (Oct. 19, 1984) to 44 U.S.C. §§2201-2207 (1982 & 1982 Supp. V 1987).

[45] 44 U.S.C. §2203 (a).

[46] 44 U.S.C. §§2203(c), 2203(d).

[47] 44 U.S.C. §§2203(f)(1) (making Archivist custodian and imposing obligation of public access), 2204 (authorizing Presidential restrictions under enumerated categories). *See* Exec. Order 12667, 54 Fed.Reg. 3403 (Jan. 18, 1989) (providing for coordination among Archivist, present and former President on release of records of former President).

[48] Compare 5 U.S.C. §552(b)(1) -(6) with 44 U.S.C. §2204(a)(1)-(6).

The Act's provisions were written to follow the guidelines established for Congressional regulation of Presidential records established by the Supreme Court in *Nixon v. Administrator of General Services*.[49]

8. FOIA

The Freedom of Information Act ("FOIA")[50] does not require preservation of agency records. The FOIA requires that the public be given access to records but does not require them to be maintained, preserved, or created in the first place. The FOIA arguably can be used indirectly to require the preservation of electronic files,[51] however. If an FOIA requester requests access to a large number of electronic files, a reasonable inference is to require the agency possessing the records to preserve them until its FOIA access obligations are determined. Those files that are exempt from public access under the FOIA could be destroyed.

The requester would argue that the Freedom of Information Act would be defeated by permitting an agency to destroy records that eventually would be subject to access under the Act. Under this argument, an injunction against destruction or erasure would be necessary to permit FOIA rights of access eventually to be realized. This is essentially the rationale adopted by the D.C. Circuit in *American Friends Service Committee v. Webster*.[52]

The absence of explicit linkage between the FOIA and records statutes creates problems for sound records management. Agencies are concerned that declaring something to be a record for records management purposes will increase the likelihood of access under the FOIA. They tend, therefore, to be underinclusive in their records management practices. Ironically, the FOIA definition of agency record has been interpreted more broadly than NARA interprets the records definition under the records statutes.

9. Paperwork Reduction Act

The current text of the Paperwork Reduction Act makes records management a part of information resources management and gives OMB authority to review compliance with records management laws and regulations.[53] A bill to extend the Paperwork Reduction Act was developed in the current Congress, but failed to pass before the Congress adjourned. A December 1989 version of H.R. 3695 amends the federal records act to authorize the Archivist of the United States to issue regulations establishing standards for interpreting the term "records."[54]

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[49] 433 U.S. 425 (1977). *See* H.R.Rep. 95-1487, 95th Cong., 2d Sess. at 6, reprinted in 1978 U.S. Code Cong. & Admin. News 5732, 5737 (discussing case and justifying provisions of bill that became Presidential Records Act).

[50] 5 U.S.C. §552 (1988).

[51] Or paper files.

[52] 720 F.2d 29, 69 (D.C.Cir. 1983) (affirming district court order compelling development of adequate records disposal plan and enjoining destruction of records until plan developed; finding standing and reviewability). *See* NARA Report at 20 (suggested language).

10. Privacy Act

The Privacy Act[55] has little effect on electronic records management practices, except that it has marginally improved agency practices by creating an additional incentive to designate certain electronic information systems as containing records, thus making NARA aware of them.

C. Regulations, Schedules, and Guidelines: Existing and Proposed

1. OMB/OIRA

OMB has directed that agencies should incorporate records management and archival considerations in the design, development, and implementation of electronic information collection systems in accordance with the Federal Records Act.[56]

2. GSA

The General Services Administration ("GSA") has issued regulations identical to those issued by NARA, discussed in the following section.[57]

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[53] 44 U.S.C. §§3504, 3513.

[54] Typescript bill (November 17, 1989). H.R. 3695 §205(a) (amending 44 U.S.C. §3302 authorizing new paragraph 4 to paragraph 3 to authorize promulgation of standards for interpreting the definition of the terms 'records' and standards to be incorporated into recordkeeping requirements by heads of agencies).

[55] 5 U.S.C. §552a (1988).

[56] 52 Fed.Reg. 29454 (Aug. 7, 1987) (paragraph h), referring to 44 U.S.C. §§29, 31, and 33.

[57] 55 Fed.Reg. 19221 (May 8, 1990) (to be published at FIRMR 201-45.2).

3. NARA

a) Regulations

NARA revised its regulations addressing electronic records on May 8, 1990.[58]

On May 8, 1990, NARA published a final rule revising its regulations on electronic records.[59] The rule established procedures for management of electronic records, for selection and maintenance of electronic storage media and for compliance with legal requirements for disposition of electronic records. Identical regulations were issued simultaneously by the General Services Administration.

The new NARA rules, like longstanding statutory and regulatory records management policies, impose on individual agencies the primary responsibilities for development and implementation of electronic records management plans. Under the regulations, the head of each Federal agency must ensure that his or her agency manages its electronic records so as to satisfy certain requirements:

-- assigning responsibility for an agencywide program for the management of all records created, received, maintained, used, or stored on electronic media, and notifying NARA of the name and title of the person assigned the responsibility.

-- integrating the management of electronic records with other records and information resources management programs of the agency.

-- incorporating electronic records managemento objectives, responsibilities, and authorities in pertinent agency directives and disseminating them throughout the agency as appropriate.

-- establishing procedures for addressing records management requirements, including recordkeeping requirements and disposition, before approving new electronic records systems or enhancements to existing systems.

-- ensuring that adequate training is provided for users of electronic records systems in the operation, care, and handling of the equipment, software, and media used in the system.

-- developing and maintaining up-to-date documentation[60] about all electronic records systems adequate for specifying technical characteristics for reading or processing records, identifying defined inputs and outputs, defining the contents of files and records, determining restrictions on access and use; defining conditions and rules for adding changing or deleting system information and ensuring the timely, authorized disposition of the records.

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[58] 55 Fed.Reg. 19216 (May 8, 1990) (revising 36 CFR Part 1234).

[59] 55 Fed.Reg. 19216 (May 8, 1990) (revising 36 CFR Part 1234).

[60] *See* 36 CFR §1234.20(b) (as revised May 8, 1990).

- specifying the location, manner, and media in which electronic records will be maintained to meet operational and archival requirements, and maintaining inventories of electronic records systems to facilitate disposition.
- developing and securing NARA approval of records disposition schedules, and ensuring implementation of their provisions.
- specifying the methods of implementing controls over national security-classified sensitive proprietary, and Privacy Act records stored and used electronically.
- establishing procedures to ensure that the requirements of this part are applied to those electronic records that are created or maintained by contractors.
- reviewing electronic records systems periodically for conformance to legal requirements and to determine if the records have been properly identified and described, and whether the schedule descriptions and retention periods reflect the current informational content and use.

Revised 36 CFR §1234.22 specifically addressed creation and use of text documents. It requires that systems maintaining the official file copy of text documents on electronic media to meet the following requirements:

- identify electronic versions of documents appropriately[61]
- provide a method for all authorized users of the system to retrieve desired documents, such as an indexing or text search system;
- provide an appropriate level of security to ensure integrity of the documents;
- provide a standard interchange format when necessary to permit the exchange of documents on electronic media between agency computers using different software/operating systems and the conversion or migration of documents on electronic media from one system to another; and

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[61] Appropriate identifying information for each document maintained on the electronic media may include: office of origin, file code, key words for retrieval, addressee (if any), signator, author, date, authorized disposition (coded or otherwise), and security classification (if applicable). Agencies shall ensure that records maintained in such systems can be correlated with related records on paper, microform, or other media. §1234.22 (b) (as revised May 8, 1990).

-- provide for the disposition of the documents including, when necessary, the requirements for transferring permanent records to NARA.

The NARA regulations show strong concern about the permanency of record media. Revised §1234.28 (Selection and Maintenance of Electronic Records Storage Media) requires consideration of the following factors in selecting a storage medium or converting from one medium to another:

-- the authorized life of the records, as determined during the scheduling process;
-- the maintenance necessary to retain the records;
-- the cost of storing and retrieving the records;
-- the records density;
-- the access time to retrieve stored records;
-- the "portability" of the medium to permit the medium to be used on equipment offered by multiple manufacturers and to permit transfer the information from one medium to another (such as from optical disk to magnetic tape); and
-- whether the medium meets current applicable Federal Information Processing Standards.

Agencies must ensure that all authorized users can identify and retrieve information stored on diskettes, removable disks, or tapes by establishing or adopting procedures for external labeling.[62]

Agencies must ensure that information is not lost because of changing technology or deterioration by converting storage media to provide compatibility with the agency's current hardware and software. Before conversion to a different medium, agencies must determine that the authorized disposition of the electronic records can be implemented after conversion. NARA declined to amend §1234.30(b) (retention of electronic records) to require transfer of a copy of the software and operating system in order for the records to be read at the Archives. Transfer of the software and operating system, whenever necessary, can be specified by NARA when approving a records schedule.

NARA had received comments from 18 federal agencies, two private organizations, and one member of Congress on its draft regulations. Most commenters supported the concepts embodied in the regulations, while suggesting less detail. Because the detailed requirements apply only to unscheduled or permanent electronic records, NARA noted in its preamble that agencies could reduce the burdens of compliance by scheduling records as soon as possible, thus reducing the universe of records subject to the detailed requirements. Furthermore, NARA also urged agencies to transfer permanent electronic records to NARA as soon as possible after their creation, further reducing burdens on agencies.

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[62] 36 CFR §1234.28(d) (as revised May 8, 1990).

NARA rejected a comment recommending a new paragraph related to electronic signatures, on the grounds that it was premature to issue regulatory guidance on this subject. NARA noted objections to its proposed ban on floppy disks for permanent storage, and modified the language to give agencies more discretion,[63] while expressing continued concern about careless handling leading to loss of data stored on floppy disks.

b) Schedule 20

NARA has created general records schedules which govern the disposition of certain records common to many agencies.[64] General Records Schedule 20 deals with the disposition of Machine-Readable Records.[65] Instructions as to how to transfer and handle machine-readable or other magnetic media are contained in 36 CFR §1228.188 and 1234.4 (1988). These records include magnetic tape, disk packs, magnetic drums, punch cards and optical disks. The general schedule classifies records for disposition as (1) master files, (2) processing files and (3) documentation files.

Master files are databases containing statistical, scientific and other information. Databases include economic, social and political data as well as natural resources data, emergency operations and national security information. Other master files include indexes, summary files, backup files, technical reformat files and housekeeping files that facilitate use of the substantive content of master files. If information is created or received by an agency of the government in the performance of its duties under federal law, the material must be maintained in accordance with the instructions of the Archivist. Similar types of information created under contract and in the possession of the contractor must be transferred to the National Archives.

Documentation files are generally maintained to facilitate the use of processing files. The files are maintained if the corresponding master file is to be maintained. These types of files include data systems specifications, user guides and information retrieval.

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[63] "(c) Agencies should avoid the use of floppy disks for the exclusive long-term storage of permanent or unscheduled electronic records" contrasts with more mandatory language in other sections of the regulation.

[64] 36 CFR §1228.22 (1988).

[65] §20.

Processing files are intermediate files used in creation of master files and generally do not qualify for long term retention. These files include work, input and valid transaction files.

c) NARA Bulletins

NARA Bulletin 87-5 offers guidance to agencies on management of electronic records, noting that whether information is maintained in electronic form or not makes no difference in the operation of records management obligations, but it may heighten the risk of data loss, while creating the potential for more transparent and easier extraction of records of historical value for eventual transfer to NARA. The bulletin recommends including records management objectives as a part of information system design, and offers practical suggestions for agency users of electronic technologies to minimize data loss and facilitate continued accessibility of information as technologies change. It contains a chart comparing various media, and notes that information must be written to magnetic tape or paper before it is transferred to NARA.

NARA Bulletin Number 89-2[66] reminds agency heads of their legal responsibilities to ensure the security and integrity of federal records and to safeguard against unauthorized disposition, including guidance for personal papers.

NARA Bulletin Number 88-8[67] rejects optical disks as media for NARA excision of permanent records "because of the hardware and software dependence of current optical disk systems and the absence of standards that ensure affordability of data to one system to another." Paragraph 6 of the Bulletin reports that industry standards for optical disk systems are now under development. The Bulletin also explicitly permits agencies to use optical disk media for storage and retrieval of permanent records while the records remain in an agency's legal custody, although no permanent records may be destroyed after copying onto an optical disk without NARA's approval.

NARA Bulletin 88-5[68] provides guidance to agencies regarding acquisition and authorized disposition of data created or maintained on behalf of the government by contractors. The Bulletin suggests that agencies write contracts to require the delivery "of all pertinent documentation of how the contractor carried out the program, which may include transaction or case files, handbooks, directives, procedural statements, and other information created by the contractor," to the agency. The Bulletin also suggests that agencies obtain contractor-created data that may have "reuse value to the government." In the category are background data to statistical analysis reports that represent the official position of the agency or that are required by statute, production elements needed for reproduction of audio visual products including negative and magnetic soundtracks, original drawings, and other research data.

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[66] November 14, 1988, scheduled to expire November 14, 1990.

[67] September 19, 1988, scheduled to expire September 30, 1990.

[68] (May 20, 1988), scheduled to expire May 31, 1990.

D. Judicial Decisions

1. Kissinger v. Reporters Committee

In *Kissinger v. Reporters Committee*,[69] the Supreme Court held that there is no private right of action to enforce the Presidential Records Act or, by analogy, the Federal Records Act.

2. AFSC v. Webster

American Friends Service Committee v. Webster[70] affirmed in part an injunction against destruction of FBI records until the agency formulated a records retention and disposal plan meeting the requirements established by NARA.[71] The court of appeals held that the federal courts have jurisdiction to review agency action for compliance with statutory standards on records disposal and preservation,[72] and that "private researchers and private parties whose rights may have been affected by government actions" have standing to seek review of agency destruction of records in violation of statutory provisions.[73] It distinguished *Kissinger* because of its different context, especially relying on footnote 5 in that case,[74] which expressly left open the possibility of APA review.

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[69] 445 U.S. 136 (1980).

[70] 720 F.2d 29 (D.C.Cir. 1983).

[71] NARA then was the National Archives and Records Service ("NARS") within the General Services Administration.

[72] 720 F.2d at 45.

[73] 720 F.2d at 57.

[74] 720 F.2d at 52, citing Kissinger v. Reporters Committee, 445 U.S. at 150 n.5.

3. Armstrong v. Bush

Armstrong v. Bush[75] involved a suit by public interest groups to enjoin erasure of electronic mail files (created and stored on the "PROFS" system) at the end of the Reagan administration. The district court denied the government's motions to dismiss and for summary judgment. It concluded that judicial enforcement of the Federal Records Act and Presidential Records Act under the Administrative Procedure Act does not offend separation of powers. While the court was bound by the Supreme Court's determination in *Kissinger v. Reporters Committee*,[76] that there is no private right of action to enforce the records acts the *Armstrong* court, like the *AFSC* court, nevertheless concluded that these statutes impose nondiscretionary duties, the performance of which can be reviewed under the general provisions of the Administrative Procedure Act. In reaching this conclusion, it equated the committed-to-discretion-by-law exception to Administrative Procedure Act reviewability[77] with the political question doctrine. Because the obligations imposed by the Presidential Records Act and Federal Records Act are specific and the standards for determining what records must be preserved quite specific, the court concluded that ministerial duties are involved under these statutes rather than political questions. Therefore, decisions made in connection with the PROFS tapes are reviewable.

The court also concluded that disputed issues of material fact existed necessitating denial of the government's motion for summary judgment. The government argued that any obligations imposed by the Presidential Records Act and the Federal Records Act were met because guidelines applied to the PROFS tapes required that any messages the content of which would constitute Presidential records must be reduced to hard copy. The court concluded that it was potentially irrational or arbitrary and capricious to assume that these requirements were met in all cases and that it was also arbitrary and capricious to assume that any remaining PROFS files were equivalent to telephone messages rather than written records.[78] Thus facts could be proven permitting the decision to be set aside under §706(2)(A) of the Administrative Procedure Act.

The *Armstrong* case is significant in two major respects. First, it identifies a legal theory through which records keeping obligations imposed by the two records statutes can be enforced. *Armstrong* is vulnerable on judicially enforcing records keeping duties on the President, but eventual reversal on this ground still would leave intact its reasoning as applied to most agencies potentially involved in retaining or discarding electronic records below the presidential level.

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[75] 721 F. Supp. 343 (D.D.C. 1989).

[76] 445 U.S. 136 (1980).

[77] 5 U.S.C. §706(2) (1982).

[78] More generally, the court suggested that the analogy between electronic mail messages and telephone conversations itself might be arbitrary and capricious.

Second, the case tests the government's argument that electronic records are like telephone conversations and therefore need not be preserved at all.

On December 21, 1989, the district court granted the defendant's motion for certification for interlocutory appeal, and stayed further proceedings in the district court pending resolution an interlocutory appeal by the Court of Appeals. On June 5, 1990, the United States Court of Appeals for the District of Columbia Circuit granted the interlocutory appeal. The issues as presented to the Court of Appeals require it to consider whether *Webster v. AFSC* governs the PROFS case. It could conclude that the involvement of the President in the PROFS case and the Presidential Records Act issues associated therewith distinguish *AFSC* and the PROFS case. It also could conclude that *AFSC* involved the destruction of records to a greater extent than the PROFS case.

On appeal, the plaintiffs emphasized that the FOIA claim covering the records recorded on the tape would require the district court to determine whether PROFS materials are records and if so, whether they are "agency" or "presidential" records, points the Justice Department believes are judicially unreviewable questions.

III. Agency Practices

The basic approach of the records statutes and regulations is to give programmatic agencies primary responsibility for developing and implementing appropriate records management systems. NARA has policymaking and oversight responsibility, as well as ultimate custodial responsibility for records with historical value. The records management responsibility includes a duty to ensure that the activities of the government are adequately documented, as well as a duty to ensure preservation of records that actually are created.[79]

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[79] *See generally* 55 Fed.Reg. 27422, 27423 (Jul. 2, 1990) (36 CFR §1220.14, as amended, defining "adequate and proper documentation.")

A. NARA

NARA already has made some regulatory changes in connection with documentation of electronic records. More detailed requirements are not likely to be developed by NARA in the near term because of its philosophy that (1) archival uses are secondary to operational agency uses of information, and (2) agencies rather than NARA should decide in the first instance what information to create and use and retain, subject to approval by NARA.[80]

NARA has a Center for Electronic Records, representing an organizational focus for electronic records programs that has been dispersed more widely in the Canadian initiatives discussed in §III(F). NARA has actively has developed new policy guidelines for electronic records, manifested by the regulation and the training and education activities for agency personnel discussed in §III(C)(3).

B. Department of the Interior Bureau of Land Management (BLM)

The Bureau of Land Management (BLM) within the Department of Interior is developing an Automated Land and Mineral Records System ("ALMRS"), part of a larger Land Information System ("LIS.") LIS will integrate BLM's land and natural resource records, using a public land survey system to manage land resource and status information at the legal land parcel level. The LIS will integrate spatial information from a geographic coordinate database with cultural and natural resource information.[81] The result will be an automated resource data system and land conveyance and land and mineral use authorization information administered in ALMRS. BLM and NARA both expect ALMRS to be a model for federal agencies as they develop similar systems for managing, protecting, and providing disposition for records superseded by the system, the records created by the system, and the records that document system implementation. ALMRS will provide experience in identifying record types in which flat ASCII files do not work. A major goal of ALMRS is to permit graphical information as well as alphanumeric data to be managed.

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[80] *See* 55 Fed.Reg. 27422, 27425 (Jul. 2, 1990) (amended 36 CFR §1222.32(d) requires approval of Archivist for final disposition).

[81] ALMRS has three major databases, based on case recordation, land description, and status.

A BLM/NARA work group has developed system capability specifications to be contained in an eventual RFP for the system itself. The draft specifications require records retention capability to:

- designate and implement retention periods for any data set, record, or file
- delete designated temporary records only at specified times according to approved records retention and disposition schedules
- transfer unneeded records to storage media and facilities.

Records preservation capability to:

- preserve permanent records, both documents and data
- transfer designated permanent records to the National Archives
- accommodate record format established for the National Archives.

Record integrity capability to:

- restrict totally the editing of a specific file, legal transaction, or document at a given time
- restrict or block editing of specific data except by specific password assignment
- leave an audit trail of entry into databases tracking when alterations were made and by whom.

During 1990, BLM is transferring manually maintained information to electronic formats and working through a pilot program in its New Mexico offices to classify records, to provide disposition standards for each category, to establish recordkeeping requirements to ensure that legal, administrative, and archival needs are met, to test the transfer of permanent records to the National Archives, to develop recommendations for standards, policies, and procedures for BLM to use during the transition from the manual to an electronic system, and to develop government-wide guidance that might be issued by the National Archives.[82] The New Mexico test is planned for completion by the beginning of FY91, at which point test results will be evaluated by the work group. The work group will decide whether NARA wants certain types of records, such as master title plats, historical data, and serial register pages.

The original target for contract award was August 1990. The contractor initially would develop a detailed design in a pilot project. The total cost of ALMRS is expected to be $240,000,000. LIS is expected to be fully operational by 1994, with the ALMRS portion implemented with commercial off the shelf software as soon as possible, and administrative, office automation, and resource data features implemented by September 1994.

Initial requests were received from McKinley County, New Mexico and Meridian Oil to interact with ALMRS electronically, the county wanting public reading room electronic access, and the oil company wanting electronic access to its own applications for drilling permits.[83]

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[82] January 31, 1990 NAPA draft at 6.

C. World Bank

The World Bank has 6,000 people using EMail. Presently, it commits to paper matters of an official nature, but gradually is moving toward an environment in which EMail is used for official communications. The tendency is for EMail to be used for most communications until someone says, "I want your signature," and then the author of the document prints a hard copy, signs it, and sends it. There is a growing recognition that EMail constitutes an important part of the historical record, the record of the debate in the policy formulation process.

The World Bank is committed to work out a set of "cues" or templates for EMail, including specifications for informal notes, informal memoranda, official letters and letters to and from clients. In addition, there is an effort to develop naming conventions so that retrieval of documents can be more precise. The World Bank is fortunate to have good programmer resources for its DEC All-in-One system. Other agencies, however, may be better off to use communications and word processing environments that are more accessible to off the shelf indexing and library or archives retrieval software.

D. Forest Service

The Rand Corporation has studied information technology in the U.S. Forest Service.[84] The study concluded that the Forest Service has successfully internalized information technology, enabling it to become the first federal agency to employ electronic documents as its official record. Generally, an early commitment to information technology paid off in user satisfaction with applications for word processing, electronic mail, and data analysis. Nevertheless, there are problems integrating local and centralized systems and problems with excessive data in central database systems.[85] Electronic mail was identified as the most valuable feature of electronic information technology, surpassing even word processing.[86] The only problems with electronic mail, which was made more flexible to permit communicating across chains of command,[87] had to do with "junk mail."

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[83] *See* NARA BLM document at B-10 to B-11.

[84] *See* C. Stasz, T. Bickson, J. Eveland, and B. Mittman, Information Technology in the U.S. Forest Service (1990) (Rand Corporation R-3908-U.S.D.A.S.F.) [*hereinafter* "Rand Report"].

[85] Rand Report at vi-ix.

Problems exist with database management, including unpredictable updates, "inability" to find needed data, and too many duplicated files.[88] Generally, Rand recommended that the forest service provide more flexibility for effective use of microcomputers and off-the-shelf software.[89]

E. Nuclear Regulatory Commission Licensing Support System

The Nuclear Regulatory Commission's ("NRC") Licensing Support System ("LSS") is intended to manage the information related to the licensing of receipt and disposal of high level radioactive waste, which is expected to be one of the largest administrative litigation matters ever to come before the NRC. The LSS was reviewed in the report accompanying ACUS Recommendation 88-10, and is notable also in connection with the electronic records management and archives issues addressed in this report. To a considerable extent the LSS rule[90] sidesteps the direct question whether its electronic records and electronic records practices satisfy the requirements of the records acts and the NARA regulations. For example, proposed §2.1013 establishes procedures for the electronic submission of pleadings, and provides for the electronic transmission of Board and Commission issuances and orders, as well as for on-line access to the LSS during the hearing. It requires submission of official paper copies of matters made part of the hearing record and entered in the docket by the Secretary of the Commission, but leaves the Secretary with discretion to determine if the record copy for records act and archives purposes is the paper copy or the electronic version. As another example, the LSS avoids obtaining the "record" version of some documents, instead entering copies into the page-image and parallel ASCII components of the system, leaving the "record" copy under the control of the submitter.

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[86] Rand Report at 32.

[87] Rand Report at 32.

[88] *See* Rand Report at 41-43.

[89] Rand Report at 54-56.

[90] 53 Fed. Reg. 44411 (Nov. 3, 1988) (proposed rule developed by rule negotiation committee), proposing amendments to 10 CFR §§2.1-2.1117 (1989).

The LSS is a good example of an electronic records system that has been built to duplicate the "official" paper information system. If the system works as it is supposed to, however, no one in her right mind would seek to retrieve the paper counterparts of the electronic files; thus LSS may serve to build confidence that, over time, requirements for paper versions of information safely can be eliminated.

F. Canada

The National Archives of Canada has invested considerable energy in developing electronic records management and archives initiatives. For twenty years, the National Archives has supported a simple machine readable archives program. The program's initial implementation is relatively simple. Archivists appraise machine readable records for archival value, after which the records are copied onto archival quality tapes. The data are verified against documentation. The tapes are rewound each year, and the data are recopied every five years to fresh tapes. Catalogues and bulletins advertise the availability of machine readable information on tapes, and the data are maintained in a form and format which minimizes conversion costs over the long-term.[91] John McDonald, Director, Automated Information System, National Archives of Canada, has written extensively on electronic records management issues from an archivist's perspective,[92] and has generally encouraged frequent interaction and sharing among professionals concerned with archives and electronic records management.[93]

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[91] J. McDonald, Building the "Front End" to a Machine Readable Archives Program: The Experience of the National Archives of Canada at 1 (Nov. 1989) (unpublished paper) [*hereinafter* "Building the Front End"].

[92] See J. McDonald, Data and Document Interchange Standards: A View from the National Archives of Canada (Oct. 1987) (paper presented to The Society of American Archivists, New York) [*hereinafter* McDonald 1987 Archivists Paper]; J. McDonald, Records Management and Data Management: Closing the Gap (Oct. 1988) (paper presented to The Society of American Archivists, Atlanta) [*hereinafter* "McDonald 1988 Archivist Paper"]; J. McDonald, The Information Resource Director System (IRDS) and the National Archives of Canada (Oct. 1989) (paper presented to The Society of American Archivists, St. Louis) [hereinafter McDonald 1989 Archivists Paper]; J. McDonald, Building the "Front End" to a Machine Readable Archives Program: The Experience of the National Archives of Canada, (Nov. 1989) (unpublished paper) [hereinafter "Building the Front End"]; J. McDonald, The National Archives of Canada and Office Systems: A Status Report (Nov. 1989) [*hereinafter* "Canadian 1989 Status Report"].

[93] *See* Building the Front End at 6 (encouraging information sharing).

The files maintained by the Canadian archives in electronic form have been relatively small (a few thousand cases stored on single tapes), and typically contain survey and other statistical data. The standard acquisition practice has been to convert data to rectangular format, recorded in EBCDIC at a density of 6250 BPI, in IBM readable formats.[94]

The Canadians are actively involved in a number of initiatives to improve the sophistication of their approaches to electronic records. For example, the Canadian OMB, "The Treasury Board," has issued a government wide directive confirming the adoption of the OSI reference model as a Canadian government standard. A preference for OSI based systems and products will become mandatory in procurement requests in the early 1990's.[95] As a follow up, the Treasury Board is developing an Application Portability Profile ("APP"), based on work by NIST.[96]

The National Archives of Canada envisions a possible applications portability approach based on a UNIX environment such as POSIX, permitting the receipt and/or conversion of electronic records to international exchange formats such as ODA/ODIF, SGML, and GKS.[97] In addition, the National Archives of Canada believes an information resource dictionary system, ("IRDS") is of particular importance because it permits an archives organization to maintain intellectual and physical control over electronic and nonelectronic holdings.[98] The National Archives has a working group on office system standards bringing together 25 government agency representatives involved in the design, installation and use of integrated office systems. A major project of the working group is to test ODA/ODIF by exchanging information among the Treasury Board and some 4 or 5 other agencies to demonstrate ODA converters, applications portability and other related questions. The working group also plans to develop a refined set of functional specifications for managing information in an office systems environment.[99]

A report prepared in early 1990 proposed functional requirements for managing information in networked agency office systems.[100] The requirements focused on capabilities to be provided in application software:

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[94] McDonald 1988 Archivists Paper at 1.

[95] Canadian 1989 Status Report at 2.

[96] Canadian 1989 Status Report at 2.

[97] Canadian 1989 Status Report at 2. The United States has adopted aspects of the POSIX standard. FIPS Pub. 151, 55 Fed.Reg. 11424 (March 28, 1990).

[98] Canadian 1989 Status Report at 2-3.

[99] Canadian 1989 Status Report at 4.

[100] National Archives of Canada, Managing Information in Office Automation Systems: Final report of the FOREMOST project (1990) [hereinafter "FOREMOST Report"].

-- Collecting required records and safely storing them without altering content.
-- Implementing a properly organized formal records system.
-- Maintaining compatibility with software likely to be used in the office environment.
-- Allowing retention and disposition of records as specified by the owning organization.
-- Providing full text search capability.
-- Allowing a records manager to grant or revoke access privileges for records.

The automated records management system ("ARMS") offers the capability for managing electronic and nonelectronic records, including electronic mail records and word processing records.[101] The program envisions converting every document sent to the records system to ODIF standards.[102]

The report envisions a life cycle of electronic documents beginning with creation of a document in a user's "personal work space, followed by transfer of the document to another user or to the records system, at which point a document profile would be created, assessment of the utility of blocks of files to the National Archives, and actual transfer of documents to the archives in media that can be read by the archives and in formats provided by the ODIF standard.[103]

G. Optical Storage Initiatives

Optical storage, despite the hardware and software dependency motivating NARA's reluctance to accept optical storage formats, is an attractive technology to agencies confronted with large volumes of paper records. Optical storage offers great information density. Transferring paper records to optical media reduces storage requirements. The Internal Revenue Service, the Veterans Administration, the Social Security Administration all are actively using optical storage systems. The Department of Army also is transferring service records to optical disk.

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[101] FOREMOST Report at 1-10.

[102] FOREMOST Report at 21.

[103] FOREMOST Report at 37.

H. State Archives

State archivists face many of the same problems as NARA. A conference of government archivists in June, 1989[104] concluded that the common problems are (1) finding an appropriate definition of electronic records, (2) failure of information policy makers to consider archives issues, (3) inadequacy of laws and regulations covering electronic records either because of inadequate coverage or conflicting provisions, (4) lack of legislative interest in information management issues, and (5) decentralized standards for hardware and software.[105] No model electronic records program has emerged at the state level because state archivists tend to look to each other for solutions and no one has taken the lead.[106] The conference concluded that attention should be given to the following principles:

1. Archivists may use approaches for electronic records that have not worked well with paper records.
2. Archival principles like provenance[107] and original order apply to entire electronic information systems, and not to electronic records.
3. Effective access to electronic records may militate in favor of allowing the records to stay with their creators rather than being accessioned to archival repositories.[108]

In addition, the most appropriate role for archivists may change. Archivists may provide leadership in developing appropriate office information standards and in developing archival profile standards to be used in designing electronic information systems.[109] Archives may provide a public service by providing a directory of where various information systems are located and how the public can use them.[110] Archivists also may be able to help design better information systems, because of their particular perspectives.[111]

The National Historical Publications and Records Commission is funding electronic records projects in Wisconsin, Kentucky, New York and Florida, and several state archives have produced white papers concerning various aspects of managing electronic records.[112] The Commission made certain recommendations in its 1990 report for the types of research activities that should be supported.[113]

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[104] School of Library and Information Science, University of Pittsburgh, Archival Administration in the Electronic Information Age: An Advanced Institute for Government Archivists (June 4-16, 1989) (summary of proceedings) [hereinafter "Pitt Proceedings"].

[105] Pitt proceedings at 4.

[106] Pitt proceedings at 5.

[107] Origin, source.

[108] Pitt proceedings at 6.

[109] Pitt proceedings at 8.

[110] Pitt proceedings at 8.

[111] See Pitt proceedings at 8.

I. Vision of the Long Term

In the long run, wider use of electronic information technology will change administrative agency structures and application of traditional administrative law concepts.[114] Agencies will use electronic information technologies for adjudication, rulemaking, internal management and to deliver important services. In electronic adjudication, hearing and pretrial procedures all would be electronic. Recordkeeping and filing obligations imposed in aid of enforcement[115] also would be electronic, as in EDGAR and the IRS Electronic Filing Project. The rare exception would be a contested matter in which the credibility of witnesses is at issue. Even there, videotaped depositions could be taken in advance, digitized and presented to the administrative law judge through hypermedia electronic filing and database techniques. There would be a much more complete and much more accessible record of all adjudications than with paper processes. Because of the basic similarity of the adjudication process regardless of agency, certain format and software standards would emerge that would make it easier for adjudication records to be transferred among agencies and the National Archives. Appellate review of agency adjudications would be facilitated by development of judicial capacity to handle the standardized formats.

Using electronic information technology for rulemaking has even greater potential to change the way in which government operates because rulemaking as a quasi legislative process is concerned with policy making and is supposed to involve whatever public is concerned with a particular policy. Electronic information technology greatly facilitates timely public involvement and reduces burdens on agencies affording that involvement. The notice and comment process could be made largely electronic, with notices being posted on electronic bulletin boards, and comments being submitted via dialup telephone links. The electronic record of a particular rulemaking decision would be all of the entries in the appropriate table of a rulemaking database. The record on petition for judicial review would be a set of electronic pointers to appropriate places in the table.[116] A reviewing court simply would access the appropriate table through the pointers. The rulemaking process might become less discrete and more in the nature of a dialogue. In the long run, there would be a tendency for the interactive capability to blur the distinction between incomplete and complete rulemaking decisions. The technology permits a dialogue between regulator and regulatee, reducing the need for communications between the two to occur by means of formal written documents in the form of petitions, comments, and final rules.

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[112] Commission Report 4 at 7.

[113] Commission Report 4 at 8-9.

[114] The phenomenon is not limited to administrative agencies. *See generally* Cash & Konsynski, *IS redraws competitive boundaries*, Harv. Bus. Rev. Mar.-Apr. 1985, at 134 (penetration of information systems into internal business processes); B. Konsynski & F. McFarlan, Information Partnership: Scale Without Ownership (Harv. Bus. Sch. Case N1-191-023) (information technology allows enterprises to cooperate in new ways).

[115] Recordkeeping and filing are grouped with adjudication because both involve individual compliance with preexisting rules, and produce raw materials from which adjudicatory enforcement proceedings may spring.

Internal management practices would build on concepts developed for the Forest Service. Management of agency resources[117] in the electronic vision would work primarily by relaxing the need for official paper documents to record and communicate instructions and decisions to lower levels in the organization. Rather than signing a new delegation of authority, a memorandum making a change in organization structure, or a directive reallocating enforcement resources, an agency head would post a notice directly from her desktop workstation electronically changing a database record. The state of the organization, of delegations of authority and of resource allocations would be defined officially by the state of the database.

Electronic information technology also can be used to deliver some governmental services: dissemination of public information, and electronic transfers of money in connection with public welfare and subsidy programs. Electronic food stamps, direct deposit of social security checks, and electronic management of Medicare and Medicaid benefits all are examples. Such electronic information technology applications use well-proven electronic funds transfer techniques, combining them with EDI standards in the case of Medicare reimbursement. The advantages are faster availability of funds, and improved ability to audit. The problems to be solved are those of electronic contracting and electronic funds transfer generally: potentially increased risk of forgery.[118]

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[116] The component of the database associated with a particular rule could be thought of as a record. As one considers adding more and more to the file for a particular rule, however, it may be more appropriate to think of the file for a particular rule as a table containing many records, in which case the regulatory agenda for a particular agency would be a database composed of many tables.

[117] One could view management of agency resources as involving weak forms of rulemaking and adjudication, not involving the same degree of legal formality aimed at ensuring political accountability, but involving the same types of decisionmaking processes.

IV. Policy and Legal Issues

A. Goals

It is appropriate to define the principal purposes of records management and archives. The following purposes seem relatively noncontroversial:

- to maintain an institutional policy memory
- to enhance the body of knowledge in a factual and scientific sense
- to maintain official records for possible use as evidence in legal proceedings[119]
- to maintain the nation's history
- (for records management) to promote efficiency and effectiveness of agency operations
- (for archives) to increase the return on investment from information in government records which has long term value.

The last goal for archives applications would be enhanced by expanding access to archived information at reasonable costs.

Other conceivable purposes would engender more controversy, such as a goal of providing expanded electronic public access to public information on demand.

B. Some Basic Concepts

1. Classes of Agency Information

Four different types of agency information present somewhat different records management and archives problems: policy documents, scientific and technical information like satellite-collected data, agency administrative records, and social data like census data.

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[118] Forgery, broadly conceived, involves misrepresenting the author of a message, and also involves unauthorized alteration in the contents of a message.

[119] The NARA guidelines for documents to be preserved primarily reflect this goal.

Electronic policy documents only recently have presented records management problems. Because such policy documents must get distributed on paper, and because of uncertainty about electronic signatures, such policy documents virtually always are printed on paper before they are signed by the highest level decisionmaker. The paper medium is the archival record. But this practice will change, as decisionmakers increasingly have access to documents in electronic form, and as electronic transactions become a regular feature of life. Soon some agency officials may make choices by electronically checking a box on an electronic option paper sent by electronic mail. The Forest Service System[120] is another good example of changing practices regarding decisional documents. In the Forest Service System, directives from the agency head to the field offices do not necessarily exist in paper form at any time. As electronic mail becomes more pervasive, and as electronic publishing of government information becomes more common, the paper version of many official documents may disappear. As electronic mail is used more widely by a greater variety of agency decision makers below the top level, the part of public decisionmaking covered by paper documents shrinks. The PROFS System at issue in the *Armstrong* case[121] is a good example.

There also is a need for better records management plans to capture prefinal communications to preserve the content of the decision process. Such predecisional electronic transactions likely are protected by FOIA exemption 5,[122] but they are an important part of the historical record.

Scientific and technical data present very different problems. One problem is the large amount of data collected, particularly the quantities of data collected by satellite. New technology such as weather satellites enormously increase the amount of information that is collected and used by agencies like NOAA. The other problem relates to the interpretation and analysis of such information. An unskilled person cannot use satellite weather information in its raw forms even if presented on paper media. Even a meteorologist cannot use the raw information without software and careful documentation compatible with the data.

To some extent, scientific and technical data share a general problem with electronic records: a need for compatible hardware and software to retrieve the information. In another respect, however, the interpretation and analysis problem with scientific and technical data is different. Scientific and technical data is specialized and its consumers always will be specialists in particular fields such as meteorology and climatology. The specialized nature of this information justifies handling archives of such information separately from the general archives. The issue has been avoided in a direct way because NOAA, NASA, and DOD have not yet offered files containing large quantities of satellite data to NARA in an official way. There is, however, concern about NARA's ability to handle large quantities of satellite data with current resources.

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[120] *See* §III(D).

[121] *See* §II(D)(3).

[122] 5 U.S.C. §552(b)(5) (1982).

Administrative information includes purely internal information like information pertaining to agency personnel and contracting. It also includes mission-related information such as claims files for the Social Security Administration ("SSA") and the Veterans Administration ("VA"), and tax records of the Internal Revenue Service ("IRS.")[123] Agencies have their own incentives to maintain administrative information for extended periods of time, independent of obligations imposed by the records statutes. These mission-related incentives relate to a potential for litigation over contested claims, or contested personnel actions. Agencies aggressively are automating the processing of such information simply to meet increasing burdens of claims. Agencies also have incentives to apply new archival technologies to increase storage density for large volumes of information. The SSA, VA and IRS have been aggressive in exploring optical storage technologies.

Social information, like census information, has received the greatest attention in terms of electronic records management. Archived census information was the first type of archival information made available to the public, and the private sector invests much effort to ensure the utility of electronic records formats for academic researchers and others. There is, for example, a specialized trade association for users of census information.

A basic crosscutting distinction must be made, under present technology, creation and use patterns, between database information and word processing documents. Word processing documents are fixed in form, though they may exist in different versions. Databases are inherently dynamic. A document is more likely to have decisional significance than a snapshot of a database, "taken" at a time when no one happened to be retrieving information from the database. Moreover, the database itself is not what people consume or ultimately use. A database is analogous to a dictionary, out of which users extract pieces of information to assemble into documents with significant information value.

Is it more important to preserve the entire database, or the retrieval transactions? A convergence of text document and database paradigms is considered in §IV(F)(2).

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[123] NARA distinguishes "administrative" or "housekeeping" information from mission related or program information.

2. Value in Information

An important part of what makes information useful is value that has been added to the information. Nine distinct types of value[124] can be added to information, to make up an information product bundle. The nine types represent a kind of Chinese menu from which information product suppliers pick and choose, combining different amounts and subtypes[125] of the different types into products with features the supplier believes will attract significant demand.[126] The nine types are presented in the order in which they would be added to textual information in print formats.[127] The basic model is adaptable to nontextual information, and is not dependent on any particular sequence of value.

1. Selecting and arranging content. Drafting language for a textual document and the selection of entities and attributes for a database are examples. This type can be called authoring.
2. Adding typographic features such as paragraph, section, and page breaks, headings, tables and summaries, writing an outline or designing a database schema.[128] This type can be called chunking.

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[124] Both economics and law deal with added value. Added value is the product of economic activity. Law usually protects added value as property. "Value" to an economist is a holistic quality, reflected in price. This report uses the term "type of value" to refer to particular dimensions of value, or product attributes. The types of value can be thought of as the addition to value resulting from a particular process in the production activity. Alternatively, they can be thought of as product features that provide utility to consumers. There are parallels between the type-of-value idea and the hedonic dimension idea.

[125] A variety of subprocesses exists, choices among which can have important economic consequences. For example, types one and two embody drafting, editing, and revising subprocesses that have significantly different costs depending on how the author, secretary, and editor use paper, word processing, and dictating technologies. See H. Perritt, How to Practice Law with Computers, Chapter 8 (1988 and 1990 Supplement) (comparing three different cases employing different technologies).

[126] The nine types work best with text information that is factual in character, as opposed to artistic or functional. See U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* 65-66 (1986) (three content categories).

[127] The nine types encompass the information processing activities likely to be associated with publishing or exchanging electronic information. Other types could be described, which relate to higher level analysis of information, involving the kinds of functions performed by expert systems. See H. Perritt, How to Practice Law With Computers Chap. 9 (1988 & Supp. 1990). The nine types circle back on themselves. The consumer of one electronic information product may be the author of another information product, representing a human transition between the ninth type of one information product to the first type of another product.

[128] Most, but not all of these features are text compressors--short expressions that summarize larger amounts of text to facilitate browsing. See R. Taylor Value Added Processes in Information Systems 59-60 (1986).

3. Adding internal finding aids like headers and footers, cross references, tables of contents, indexes, hypermedia pointers or graphical representations of content.[129] This type can be called internal tags and pointers.
4. Adding external finding aids like substantive references and citations in footnotes or reference lists, generating multiple-document indexes, or adding hypermedia pointers.[130] This type can be called external tags and pointers.
5. Printing or displaying a single image.[131] This type can be called presentation.
6. Making multiple copies of the image. This type can be called duplication.
7. Distributing the copies to consumers of the information. This type can be called distribution.
8. Advertising and promoting the resulting electronic information product, and accounting, billing and collecting prices charged for the use of information. This type can be called marketing.
9. Assuring users and consumers of the integrity of the information product. This type includes the kind of quality control function traditionally performed by publishers,[132] relating to whether the content of a publication is likely to interest a particular consumer, whether it is likely to be accurate, and whether substantial value has been added at types two (chunking), three (internal tags and pointers) and four (external tags and pointers), so the consumer can expect high utility. In electronic information formats, type nine value also includes ensuring against corruption and ensuring authenticity. This type can be called integrity assurance.

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[129] Headnotes in reported judicial opinions are a kind of type 3 value.

[130] Type four is closely related to abstracting and indexing. See R. Taylor at 7 (describing value added by abstracting and indexing operation). Abstracting and indexing creates the hooks and tags by which chunks of information can be linked, through type four value to other chunks of information.

[131] The image may or may not be the same size as the basic "chunk" of information. A database record retrieved may fit on one screen, and a record is the basic chunk in database technology. Conversely, PC word processing software displays about half a page of single-spaced text, and that is smaller than the basic chunk of a textual document--which is the document itself, or perhaps a page, a section, or a paragraph of the document. See R. Taylor at 11 (discussing chunk concept). Attorney David Johnson argues strongly that the paragraph is the natural chunk.

[132] Readers of magazines and newspapers and purchasers of books and readers of journal articles select material based in part on expectations about the quality of information likely to be published by certain well-known publishers.

Type one (authorship) involves the raw ideas fixed in some tangible medium.[133] A rough draft, or a tape containing dictation, has type one value but little else. Paragraph breaks, outlines, pagination, subtitles, headings, represent type two (chunking) value. The difference between type two and type three (internal tags and pointers), both of which deal with internal structure and retrieval aids, is that type two is sequential or linear, while type three is random access or nonlinear.[134] Random access capability may improve retrieval efficiency. The difference between type three (internal tags and pointers) and type four (external tags and pointers), both of which involve random access, is that type three involves intra document features while type four involves inter document features. Type four includes documentary cross-references or bibliographies pointing to other parts of relevant literature, as in legal footnotes citing cases and statutes external to the citing document.

The nine types of added value can be clustered for easier understanding and exposition. Types two (chunking), three (internal tags and pointers), and four (external tags and pointers) all have to do with representation, organization[135] and retrieval of information.[136] These can be thought of as representational and retrieval factors.[137] Type five (presentation), six (duplication), and seven (distribution) types of value all have to do with delivering information, and are in some sense presentational.[138]

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[133] To borrow a concept from copyright law.

[134] Headlines, other types of prominent topical headings and other text compressors have characteristics of type two and type three (internal tags and pointers). They fit into type two because one must scan the material sequentially to find them. They are random access or nonlinear and thus fit into type three because one can read only the headlines without having to read the text between them.

[135] Types one, two, three and four embrace the "organizing" activity suggested by Kenneth Boulding as one of two knowledge-producing economic activities. The other activity suggested by Boulding is printing. See Boulding, *The Economics of Knowledge and the Knowledge of Economics*, LVI Amer. Econ. Rev. 1, 5 (1966; papers and proceedings of 78th ann. meeting; Richard T. Ely Lecture) (capital is knowledge imposed on material world by an organizing process, followed by a process akin to three-dimensional printing).

[136] Attorney David R. Johnson points out that one can distinguish value added to information depending on whether it changes content or whether it affects the way in which and the ease with which a reader can find the information.

[137] *See generally*, H. Perritt, How to Practice Law With Computers, ch. 9 (1988 & Supp. 1990) (explaining pervasiveness of knowledge representation issue in automated legal reasoning as an application of Artificial Intelligence techniques).

[138] Presentational factors are not entirely independent of representational factors, however. See Text, ConText, and Hypertext 36 (ed. E. Barrett 1988) (visual production of text on computer screen is "crippled" without accompanying typographic features); id. at 297-299 (screen design for online information products).

Type eight (marketing) and type nine (integrity assurance) value have to do with meta-information: information about information.[139]

This same nine-type value-added concept framework is as useful for evaluating the electronic archives issues as it is for evaluating electronic dissemination issues.[140] Agencies are likely to strip value from electronic records submitted to the archives for different reasons than they may strip value from information released to the public.[141] In both cases, however, it is appropriate to understand the nature of the value lost.

The National Archives can provide for all nine types of added value, or none. For example, the information transferred to the National Archives could include value added at stages one through four,[142] and the National Archives itself could add value at stages five through nine as desired by National Archives users.[143]

Alternatively, agencies could provide only the raw content (stage one value) of the information to the National Archives. Then, the National Archives system could provide for adding value at stage five, but nothing else. Stage five value (image presentation) is necessary for a person to use information and therefore stage five value is an essential part of any information system including a National Archives system.

Standards are a necessary prerequisite to transferring value added at stages one through four.[144] Standards also are necessary if an archival system is to add value at stages six and seven.[145] The stage one to four standards relate to the interface between an agency and the Archives. Standards applicable to stages six and seven relate to the interface between the archives and the user.

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[139] Professor Stigler observed that the structure of markets, the role of professions and of other aspects of economic organization frequently are explained best by the need to reduce the cost of information. See Stigler, *The Economics of Information*, 66 J. Pol. Econ. 213 (1961). Stigler is talking about information about noninformational products. When the product is information, the kind of information considered by Stigler can be labeled meta-information.

[140] *See* Perritt, *Federal Electronic Information Policy*, 63 Temple L. Rev. 201 (1990).

[141] They would strip value from information transferred to the National Archives in order to transfer a standard format, like ASCII. They might strip information offered to the public in order to avoid competing with private vendors of value-added products, as discussed in the report supporting ACUS Recommendation 88-10.

[142] Pagination, typefaces, index, tables of contents, external references.

[143] For example, presentation on screen or paper, making copies, distributing the presentation images to users.

[144] For example, the added value represented by an index cannot be meaningfully transferred unless the transfer protocol preserves pagination or other references in the index. This an example of the connection between standards and the transfer of stage three value. Footnotes cannot be transferred meaningfully unless there is some kind of standard to link the content of the footnote to the footnote reference. This is an example of the connection between standards and the transfer of stage four value.

C. Technical Issues with Legal Implications Raised by Electronic Media

A 1990 report of the National Historical Publications and Records Commission[146] identified the following problems and issues for electronic records:

-- System dependencies
-- Storage media
-- Easy changes and easy loss of information
-- Difficulty in defining a record
-- Difficulty in distinguishing originals from copies.[147]

The Commission concluded that the following solution alternatives are worthy of attention:

-- System design to provide for electronic records management and archival needs from the beginning
-- Development of appropriate standards to reduce fragmented system dependency
-- Interdisciplinary projects.[148]

The following sections in this subpart elaborate on the issues raised by the new technologies, generally agreeing with the Commission on the nature of the problems posed.

1. Records disposal

A major problem with paper records is storing them. If everything is saved, storage requirements become too great. Moreover, effective access for legal, policy development, or historical reasons becomes much more difficult with larger inventories of paper records, because finding the desired record requires one to review many more records. Thus, an important objective of a sound records management policy governing paper records is to ensure that a substantial portion of records without historical value are disposed of.

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[145] Standards translating attributes in a text file to video display attributes are necessary to display fonts and attributes such as bold facing and underlining. Standards also are necessary for any kind of data communication, and thus are necessary for adding stage seven value.

[146] National Historical Publications and Records Commission, National Archives and Records Administration, Electronic Records Issues: A Report to the Commission (No. 4 March, 1990) [hereinafter "Commission Report No. 4"].

[147] Commission Report 4 at 3-5.

[148] Commission Report 4 at 6.

Electronic technologies mitigate this need to some extent. The space required to store information in electronic form is several orders of magnitude less than the space required to store paper information. Moreover, electronic retrieval techniques make it less burdensome to search for a particular record through many undesired records.

Nevertheless, there is a practical need for considering records disposal as a part of system design. Electronic storage technologies have finite capacities. Frequently, as occurred with the Forest Service system, insufficient attention is paid to getting information out of a system. When information is not removed from electronic systems, storage requirements soon exceed design assumptions.

2. Records retention

Records retention requires deciding what records should be retained and then actually keeping those records when other records are destroyed. These two acts, deciding and keeping, can be done at the same time or they can be separated. In an extremely simple hypothetical agency, a decisionmaker could review records, making judgments on the spot as to what records are of historical value and setting those records physically aside for retention while throwing other records in the waste basket.

In the real world, however, the decision about what to retain is made in the abstract, through the articulation of criteria for retention. Then the act of keeping records meeting the criteria is made by someone else (perhaps a computer) at a later point in time.

Electronic technologies raise two generic problems with records retention. First, they make it much easier to destroy records. Second, they also make it easier to apply predeveloped criteria for records retention.

There is no question that text and document management systems are appropriate adjuncts to a sound electronic records management plan. Otherwise dispersal of electronic documents on decentralized computer systems, and cryptic file names make capture of appropriate official records even more difficult in an electronic regime than in a paper regime. Moreover, electronic document management approaches may make it easier to discover and capture official records using electronic techniques than is possible with paper techniques.

Agencies usually assign a relatively low priority to record management activities. It is not likely to be feasible, therefore, to impose additional burdens on agency employees to code working documents for eventual archival purposes if the coding requirements impose any significant cost, in terms of time or inconvenience. Certainly a post hoc requirement to reformat word processing documents with archival value would impose significant costs. Therefore, the best approach for textual documents either is to design archival coding into the document management system at the outset, or to have an overinclusive schedule that causes most textual documents to be transferred to the Archives on increasingly inexpensive storage media, assuming that free text searching techniques can only improve and, even with the present state of the art, would permit appropriate retrieval precision when someone wants to access the documents.

The ultimate goal should be making records management transparent to agency employees. For example, official correspondence could necessitate a flag that must be sent before the system would recognize it as official correspondence. The flag would cause the document to be saved and processed for eventual archiving.

Designing agency information systems to provide adequate records management capability, transparent or otherwise, implicates a tension between centralized and decentralized automation strategies that is pervasive in office automation.[149] Centralizing information system administration makes it easier to ensure that records management policies are followed. But centralization deprives individual users of the autonomy they have come to expect as a result of the PC revolution. Autonomy in using computing resources is not only an expectation; it is a technological capability that enhances individual productivity.[150]

There are two points to be made about this tension. First, the tension should be recognized. It is unavoidable. It also is not new; the conflicting desires for centralized control and decentralized entrepreneurial energy is a central issue of organization design.[151] Second, a really good electronic records management program permits substantial amounts of user autonomy with respect to software selection and use patterns. A concrete example may be helpful in illustrating this point. Suppose an agency adopts ODA/ODIF as the standard for its textual documents. It might consider three alternative strategies for ensuring that agency personnel comply with the standard. One strategy would be to develop new word processing, document management, and desktop publishing systems that comply with the standard. A second alternative would be to procure commercially available products that comply with the standard and to permit personnel to use no other products except a single selected product, say Microsoft Word. A third alternative would be to identify a preferred product, say Microsoft Word, and allow users to use any other product as long as files can be transferred from the nonpreferred products to the records management system, say in ASCII form or some other interchange medium.[152] Of these alternatives, the first is the worst, and the third is the best. The public interest is not served by sacrificing agency effectiveness and productivity in the interest of long term archives enhancement. Electronic records management practices must serve both goals.

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[149] *See* H. Perritt, How to Practice Law with Computers Chapter 8 (1988 & 1990 Supplement).

[150] Individual users having reasonably autonomous control over their own computing resources can develop macros, select their own software, and otherwise be innovative in matters that help them get their own work done better.

[151] *See* A. Chandler, The Visible Hand (1977) (describing centralized and decentralized approaches followed as railroads pioneered large scale organization design, and General Motors and Dupont followed different strategies).

Considering management of electronic records forces planners to think about a choice that regularly confronts designers of document management systems for office automation systems. Should one invest effort at the beginning in formats and indexing for an eventual retrieval, or should one simply save the information in whatever format is best for its original use and burden the individual archive user with search and retrieval effort?[153] A clear example of this choice is between formatted textual databases and free text search.[154]

Historically the National Archives took the latter approach. Information was, for the most part, simply forwarded to the National Archives in whatever formats existed, with only limited effort expended towards indexing. Computer database techniques, however, generally focus on front end investments in tagging aimed at reducing the cost of eventual retrieval. To the extent that front end formatting and tagging imposes avoidable human costs, the protocol for records retention is less likely actually to be followed by document generators and receivers. On the other hand, some features aimed at records management can be built into database systems at a relatively low cost. Database approaches frequently are preferred by agencies, not for any reasons having to do with records management, but simply to facilitate accomplishment of the agency mission.

Document management systems that associate profiles with specific textual documents apply some of the database design approach to free text documents. The reworked Forest Service system, providing virtually immediate dissemination of agency head documents to some 300 field offices has a document field that automatically causes appropriate documents to be designated as official records and referred electronically to the archives.

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[152] Microsoft's RTF and IBM's DCA/RFT might be examples.

[153] This is another way of raising the publish-on-demand possibility.

[154] *See* H. Perritt, How to Practice Law with Computers 442-444 (1988).

The philosophy expressed by the NARA guidelines envisions that individual microcomputer users follow records management plans in creating files within word processing, database, and spreadsheet applications and that such individual users refrain from erasing files before ensuring that an appropriate official copy exists. Ensuring compliance with such guidelines is extremely challenging. Decentralization of computer file management associated with the microcomputer revolution obviously increases the challenge.

On the other hand, ensuring compliance with this electronic records management philosophy is no more challenging than ensuring compliance with paper records management philosophies, given the reality that important subsets of agency records exist in filing systems (which may not be all that systematic) under individual control, and not only in centralized agency file rooms.

Indeed, it may be easier to capture appropriate records when the records exist in electronic form than when they exist in paper form. A paper document existing only in the personal files of the author and the addressee may never be known to an agency's official records management system. An electronic equivalent of the same document is likely to exist on a computer network and can be discovered by an appropriately designed electronic protocol for electronic records management.

Electronic technology permits draft management, because a well designed office automation system can track who looked at and commented on a document and when.

Automating capture of drafts and of decisionmaking records is much easier on networked computer systems, as compared with free standing microcomputer systems. On networked systems, the records management functions can be designed into the host or the file server, which keeps most of the files for an entire system of users. On free standing microcomputer systems, in contrast, the only way to implement automated records tracking functions is to rely on the user of the particular microcomputer periodically to transfer documents via floppy disk or other transferable medium or to rely on a management function that periodically copies documents from the hard disk of each microcomputer. Indeed, Local Area Networks ("LANS") force a degree of electronic records management on users and LAN administrators that is not absolutely necessary in standalone computing environments. If users are to be able to find files on a LAN, some attention in designing and running the LAN must be given to electronic records management.[155]

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[155] McDonald 1988 Archivist Paper at 5.

Well-accepted technologies do not permit capturing marginalia, however, although the Wang Freestyle technology, if it is accepted in the marketplace (or is a part of a government standard), could permit systems to capture voice comments and other marginal input. Alternatively, of course, wide acceptance of an existing comment management system would permit such information to be retained.

Despite these technological capabilities, the goal of capturing draft documents in order to record the process of policy making is, to a considerable extent, unrealistic.[156] Draft documents do not necessarily reflect the policy deliberations, and forcing the retention of drafts may be impracticable.

The author has had considerable experience in negotiating labor agreements and participating in policy formulation at the cabinet and subcabinet level of the United States Government. Both of these processes produce many draft documents. Many of the most important ingredients in the policy development process, however, are oral, and are never reflected in discrete changes between two identifiable draft documents. Moreover, many drafts are never seriously considered, because they were written at lower levels not informed by the most current discussions among decisionmakers, because they were drafted by interested parties and submitted to the decisionmakers, or because they reflected efforts to make more concrete the options at the margin of what policy makers were willing to consider. Not only do such draft documents not capture the main parts of policy deliberations, preserving them may affirmatively mislead as to what was seriously considered.

Requiring that personal computer users keep all drafts of their documents on a central network server is somewhat like requiring office workers to keep no papers in their desks, but only in centralized filing cabinets. The likelihood of compliance is low. Of course, one could design personal computers so that they do not have disk drives, just as one could design desks so they do not have drawers. Such an approach, however, sacrifices worker convenience and productivity in the interests of records management, and this may not be a sensible organizational strategy.

The policy formulation process is as much oral as it is written. The new technologies do not change that reality, unless electronic mail induces decisionmakers to deliberate less face to face and over the telephone and more via electronic mail.

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[156] In reviewing an earlier draft of this report, NARA staff disagreed with the conclusion that goal of capturing draft documents in order to document the process of policy making is unrealistic. NARA believes that the public has a right to know about the evolution of policy and that it is realistic to demand that agencies make an effort to document the evolution of policies. The records management statutes require agencies to maintain adequate documentation of policy and programs. Drafts may reflect how policy and programs are developed, and therefore be part of adequate documentation. Reportedly, a draft of policy papers for the Japanese-American Internment Program in 1942 revealed important new information about the purpose and the factual basis for the Internment Program.

Significant investment or distortion of agency practices is not warranted in order to capture draft documents. Moreover, as one archivist put it, "People will doodle, and they will figure out a way to frustrate any totalitarian records management system that won't let them doodle." Other archivists, however, stress the importance to the historical record of draft documents. An appropriate conceptual approach to the draft question may be to distinguish between personal drafts and institutional drafts--those that are circulated within an organization for clearance or revision. Only institutional drafts should be covered by retention schedules.

The NARA guidelines may be too limited in requiring structured and field-based approaches to automatic document retention. It is a mistake to limit thinking about automation retention selection to structured headers. Effort should be invested to develop free text algorithms (probably on an agency-by-agency basis) for selecting documents as candidates for retention.[157] Free text searching technologies available now would permit development of reliable algorithms for individual agencies, based on key words likely to be contained and archival records. Thus, the full text of working documents could be searched at appropriate intervals, with the algorithm deciding what records should be archived. Resources permitting, NARA's Center for Electronic Records will begin working on free text retrieval approaches in FY91.

3. Records integrity and accessibility

Records retention in archives does no good unless the archived records can be accessed. Three technical issues with legal implications relate to accessibility. All have to do with integrity, in some sense. Meaningful access to electronic records requires that formats be processable and readable. Paper records that physically survive remain readable as long as one understands the language that they are written in. Electronic records present larger hardware, software and format compatibility problems. Some electronic records deteriorate more rapidly than some paper records.[158] Large quantities of records impede practical retrieval unless records are indexed.

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[157] There is room for debate about whether the development of such algorithms is practicable. The state of the art in natural language processing is still rather primitive.

[158] FAX messages on special paper probably deteriorate more rapidly than some magnetic media. Some electronic media such as materials for optical recording may deteriorate less rapidly than paper.

a) Easy alteration

Magnetic media can be altered more easily and there is less likelihood of detecting the alteration than in paper media. If one changes something on a piece of paper, the eraser or the white out frequently is evident--at least on the original. Because the physical changes involved in changing the content of magnetic storage are not visible, the possibility of undetected alteration of magnetic records is appropriately of concern. It should be noted, however, that information stored on optical media cannot be altered as easily--at least on CDROM media. Especially for information that is used for evidentiary purposes in legal proceedings, procedural or technology techniques must be used to reduce the risk of undetected alteration.

b) Deterioration of media

Environmental control[159] is important to protect paper and bindings.[160] All post-1840 paper is subject to acid deterioration which cannot be halted, except for freezing or helium atmosphere storage. In 1986, the Law Library Journal included an updated report on the life-span of paper.[161] It concluded that 20th century paper possesses a life-span of 30-80 years, depending on the production quality of the book and of the individual paper (in the case of photocopies or unbound works).[162] Another report indicates that the maximum longevity of 20th century paper is 50 years.[163] The House of Representatives has inquired into the problems presented by deteriorating paper information.[164]

Microfilm. Microfilm exceeds all other recording media in terms of longevity. Estimates range upwards to 300 years for silver microfilm and to 100 years for diazo microfilm. Silver film, however, is more easily destroyed by fungus and scratches than its diazo counterpart.[165] Microfilm requires particular storage conditions, and appropriate processing and packaging in order to avoid quick deterioration.[166]

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[159] Especially temperature and humidity.

[160] 73 Law Library Journal 835-36 (1980).

[161] 78 Law Library Journal 244, 258.

[162] *Id.*

[163] 50 College & Research Libraries, No. 5, 577 (Sep.1989).

[164] *See* House Committee on Government Operations, Establishing a National Policy on Permanent Papers, H.Rep. 101-680 Part 1, 101st Cong. 2d Sess. (report accompanying H.J.Res. 226) (urgently recommending use of acid free permanent papers by federal agencies and private sector; reporting average cost of $50 per book for Library of Congress effort to microfilm books that have deteriorated); To establish a national policy on permanent papers, Hearing before the Government Information, Justice, and Agriculture Subcommittee of the Committee on Government Operations, House of Representatives, 101st Cong. 2d Sess. on H.J.Res. 226 (February 21, 1990) [hereinafter "permanent papers hearings"].

Magnetic Tape. Conservative estimates concerning the archival lifespan of magnetic tape range from five to ten years.[167] There are other estimates asserting that the tape may last up to twenty years.[168] Reliability of estimates are questionable, however, because of the wide use of the Arrahenius test,[169] which incorrectly presumes that accelerated testing produces the same or similar results as actual long term exposure.[170]

Like any recording medium, the better the quality of the product, the longer it will last.[171] Additionally, appropriate storage conditions extend the lifespan of magnetic tape. The key to successful storage is the retensioning of the tape at least every two years.[172] This presents a burden for constant retensioning on a records custodian like the National Archives, which may possess millions of tapes.

Magnetic Cartridges. Magnetic cartridges are better for storage than magnetic tape. An accelerated test performed by IBM indicated that the 3480 class tape cartridge ("3480") has a life expectancy of over thirty years.[173]

From an archives institutional perspective, cartridges are better than magnetic tapes because no attention need be given to retensioning of cartridges.[174] Also, the casing of the cartridge prevents many of the dangers associated with handling of tapes.[175] For example, there is less danger of dust or fingerprints damaging the tape because it is sealed in the casing, unlike the magnetic tape on exposed reels. While cartridges require ambient storage conditions similar to those of magnetic tape, they can withstand more severe conditions than magnetic tape.[176]

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[165] Fungus can destroy film in a matter of days.

[166] 73 Law Library Journal 835-36 (requirements: 70 degrees Fahrenheit and 40% humidity).

[167] Telephone interview between Richard J. Ciamacca, research assistant to author, and Dana Grubb, representative from National Institute of Standards and Technology (Oct. 19, 1989). There is no difference between 7 and 9 track tape with respect to lifespan and storage.

[168] *Id.*

[169] *Id.*

[170] *Id.* The test attempts to create ordinary storage conditions but applies them at an accelerated rate so as to illustrate the long-term effects on storage media. This test has not been shown to produce accurate results. *Id.* The problems of this test are equally applicable to all recording media which is tested using the Arrahenius system.

[171] *See* 3M, 3M Black Watch: Blackcoated Computer Tape (1989) (corporation's advertisement pamphlet; Blackwatch computer tape evidences little wear after 2,000 passes while conventional tape is scratched after 500).

[172] Telephone interview with Dana Grubb, representative from National Institute of Standards and Technology (Oct. 19, 1989). Retensioning is simply the rewinding of the tape at approximately 13 ounces. *See* 3M, 3M Black Watch: Blackcoated Computer Tape (1989) (corporation's advertisement pamphlet).

[173] T. Weir, 3480 Class Tape Cartridge Drives and Archival Data Storage: Technology Assessment Report 6 (National Archives Technical Information Paper No. 1, June, 1988).

In order to ensure reliability, vendors suggest that cartridges be exercised annually or semiannually.[177] Archivists must consider which type of tape to use in cartridges. Chromium oxide tape is less stable than iron oxide tape, particularly in the long run.[178] "If archivists use a chromium dioxide medium, they must monitor it rigorously for deterioration and insure proper storage and handling."[179]

Diskettes. Neither the American National Standards Institute (ANSI) nor the National Institute of Standards and Technology (NIST) have compiled data on the archival life expectancy of magnetic diskettes, though ANSI currently is conducting tests on diskettes to determine their longevity. Regardless of the type of diskette,[180] the archival life expectancy of a magnetic disk allegedly is forever.[181] Diskettes possess an estimated 1,600 hours of usable life; that equates to over 32 million revolutions.[182] Under the proper storage conditions, a diskette may never lose its stored information due to nonuse. These conditions should be approximately 75 degrees Fahrenheit and 40% relative humidity.[183]

The main problem with diskettes is their susceptibility to damage caused by improper storage or handling.[184]

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[174] *Id.* at 13 (3480 drive compensates if there is tension problem).

[175] *Id.* at 18.

[176] *See id.* at 8.

[177] *Id.* at 9.

[178] *Id.* at 9. The short-term reliability of chromium oxide cartridges is better than that of iron oxide cartridges. The problem is that there are little data on the long-term chemical stability of chromium oxide. Additionally, there is fear that chromium oxide is more likely to adversely react with the binder, thereby destroying the tape. *Id.*

[179] *Id.* (report indicates that risk of long-term problems with chromium oxide is probably small).

[180] Types: 5.25" high and regular density, and 3.5" high and regular density.

[181] Telephone interview with Susan Michaud, representative for Kodak, Inc. (Nov. 6, 1989).

[182] *Id.*

[183] *Id.* (disks can survive in temperatures ranging from 50-125 degrees).

[184] *See* Diskette Technical Service, 3M Diskette Reference Manual 62-5 (July 15, 1988).

CDROM. There are no confirmed data on the lifespan of CDROMs.[185] The CDROM technology is so recent that there has not been ample opportunity to conduct tests on its reliability and storage life expectancy.[186] NIST agrees with this proposition but notes that there is an industry consensus that information stored on a CDROM is secure for at least 3-5 years, with some estimates reaching as high as 20 years.[187] The relatively short estimates for CDROM at least superficially are inconsistent with the virtually unlimited estimates for magnetic disks and WORM.

WORM. Like CDROMs, there is little available data on WORMs[188] because testing is currently being performed. Kodak, however, offers a 30-year warranty on Kodak WORM products, though it claims that information stored on the WORM can last forever.[189] Like all other computer readable media, the longevity of a WORM depends on the product's quality, on careful storage and handling, and on the amount of use (more use leads to shorter life expectancy).

c) Storage Formats

Maintaining hardware and software necessary to access electronic records, which over time will embody a diverse universe of storage technologies, is impracticable. Storage formats can be handled by periodic copying of files to new media and formats. This deals with the problem of readability of the records. A separate issue conceptually is preservation of the capability of accessing and processing electronic records as technology changes. One may be able to read the bits constituting a record created by a Radio Shack TRS 80 Model I computer in 1978. But that does not mean one will have available an operating system and the primitive word processing program necessary to make sense of the bits. Similarly, it would be difficult to access a document saved in 1984 by the Perfect Writer word processing software running on a CPM microcomputer and saved on a low density 5.25" floppy diskette.

The NARA guidelines may be too limited in requiring structured and field-based document management. It is appropriate also for electronic records management plans to include free text searching, because that may be the best way to find a document that has not been indexed according to a structured approach, or in which the key words assigned during the indexing process subsequently proved to be inadequate.

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[185] Compact Disk Read Only Memory. Bowker, 1 Legal Publishing Preview No. 6, 77-79 (Sep./Oct. 1989).

[186] *Id.*

[187] Telephone interview between Richard J. Ciamacca, research assistant to author, and Dana Grubb, representative from NIST (Oct. 19, 1989).

[188] WORM is an acronym for Write Once Read Many [times].

[189] Telephone interview with a representative from Kodak (Oct. 19, 1989).

Generally, there is concern that any storage medium may become outdated by the quick advances of technology in computer hardware. Already, the federal government is having problems finding computers to read tapes from the 1960s.[190] The Census Bureau managed to transfer data from the 1960 census to newer media and formats,[191] although raw data from the 1960 census were lost before anyone articulated a requirement to preserve data in machine-readable form. The most precise data remaining was the lowest level aggregation. Unfortunately, Census reported in May 1990 that files other than public use files holding data prior to 1989 are practically inaccessible because of system dependencies and ad hoc data compression.

The potential for adaptability should be taken into account when selecting a computer readable medium for long-term storage of information. The Internal Revenue Service requires that corporate taxpayers who submit electronically must maintain not only the electronic records supporting the filing, but also a complete copy of the system that can retrieve the information and the operating system.

Mass electronic storage is not the problem; the problem is ensuring access to electronic information over periods exceeding thirty to forty years. Several years ago, a NARA advisory committee said the only way to assure permanent accessibility was to record information in human readable form. It expressed confidence that conversion between human readable form and electronic forms would be nearly transparent. NARA rejected that conclusion, believing that technologies would develop to the point that accessibility of information would not depend on the availability of the same hardware and software that created it. The current solution, and an acceptable one for the future, to impermanence of electronic information in various media is to recopy or "refresh" electronic information at periodic intervals. One simply recopies magnetic tape or files on magnetic disks. Recopying is a solution not only to impermanence but also to technological obsolescence. When a format standard is becoming obsolete, information can be recopied to a new format standard. Of course this recopying requires resources and effective implementation of a program that ensures the copying and appropriate intervals.

The current staff thinking at NARA is that appropriate standards are the best way to assure infinite accessibility notwithstanding changes and hardware and software platforms. What is needed is a new richer standard to serve the function now served by flat file ASCII.

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[190] New York Times (National), Oct. 10, 1989, at A20, col. 1.

[191] In 1978, the Census Bureau reported to the National Archives that it had successfully converted files in a Univac II-A tape format to a current format, losing only 0.1% of the physical records.

4. Indexing and retrieval methods

Part of the integrity and access issue involves indexing, searching and retrieval technology questions. These are sufficiently important questions that they warrant separate discussion, in the following section.

D. Archives Retrieval, Access and Distribution Possibilities

As long as the National Archives involve only paper documents, using the archives necessitates physical access to retrieve information. As a larger proportion of the archives exist in electronic form, a wider variety of access and retrieval means becomes feasible. Technology permits access to electronic documents by persons located long distances from where the documents physically reside, by means of telecommunication links. Automatic indexing techniques can be used to generate inverted indexes from electronic documents permitting users to engage in free text searching. Moreover, electronic documents in limited quantities can be duplicated much faster and more cheaply by copying them onto magnetic or optical media than making xerographic copies of paper documents or paper or photographic copies of microform documents. These accessibility, retrieval and reproduction characteristics of electronic records present opportunities and policy issues not heretofore confronted by the National Archives. In particular, policy makers may be forced to decide if the National Archives should evolve into a kind of central electronic repository for government information, accessible electronically by citizens either directly or through value added intermediaries. Thus, electronic archives issues overlap to a considerable extent with electronic access and dissemination issues involving current agency electronic records.[192]

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[192] Federal Agency Use of Computers in Acquiring and Releasing Information (Recommendation 88-10), 54 Fed. Reg. 5207, 5209 (Feb. 2, 1989), to be codified at 1 CFR §305.88-10 [hereinafter "ACUS Recommendation 88-10"]; *See* H. Perritt, Electronic Acquisition and Release of Federal Agency Information (Oct. 1, 1988) (report); Perritt, *Electronic Acquisition and Release of Federal Agency Information: An analysis of ACUS recommendation*, 41 Admin. L. Rev. 253 (1989); Perritt, *Federal Electronic Information Policy*, 63 Temple L. Rev. 201 (1990).

1. CDROM

CDROM makes information distribution more efficient because much information can be put on a single 3.5" or 5.25" optical disk: 500 megabytes, the equivalent of 275,000 pages of single-spaced, typewritten text.[193] CDROM is a solution to distribution, not storage and access. The relatively high fixed cost of a CDROM disk[194] means that it is justified only when the demand for particular information is expected to be high. It is a promising technique, for example, for distributing NARA materials, and other public information, to public libraries.

The first issue with CDROM is the issue of how actively the government should engage in electronic publishing--one of the core issues addressed in ACUS Recommendation 88-10. For example the Bolder Data Center, formerly a relatively passive archives, began combining and releasing its data on CDROM formats, and the demand for the information soared. This raises the possibility that a more affirmative effort by archives organizations to package information and make it easily useful by client groups, would increase its utility.

A second issue with CDROM is the pervasive format standards issue. Both the relational database and the distributed database concepts raise the possibility that in the future, many databases will be organized with relatively standardized "hooks." Someone wishing to combine the data or to access the data in new ways will be able to access these hooks, even without any effort to combine or organize the data in advance in a macro way.

A third issue with CDROM relates to intellectual property, because existing standards for organizing information (data structures) and for accessing it are proprietary. If one set of hardware and software are used to record the information, it is not clear how the information can be accessed without the same hardware and software being available to a user.

The best solution to this problem undoubtedly is through development of appropriate standards in GOSIP, and compliance with those standards by vendors wanting to serve the government market.

2. Dialup Access

Despite the eventual attractiveness of direct electronic links, overnight express of 5.25" diskettes or CDROM disks probably will be more cost effective than dialup access to archival materials for a long time. The major reason for this advantage of physical transfer is bandwidth. 2400 baud or even

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[193] H. Perritt, How to Practice Law With Computers at 734.

[194] CDROM disks must be "mastered," in order to make multiple copies. Fixed costs for a short run of 500 disks can approach $5,000-$10,000.

9600 baud is not a very efficient way to transfer large amounts of information. The telephone system is not likely to offer higher band widths to ordinary users of information in the near term. Senator Gore proposed a "national information system," centered on a "National Digital Library," to distribute the 88 million printed and recorded items in the Library of Congress. James Billington, chief librarian of the Library envisions citizens being able to access Library materials at their local libraries. The Office of Science and Technology has proposed setting up a National Research and Educational Network, linking 1,000 research sites with the capacity to send 50,000 single spaced typed pages in one second. OST head Allan Bromley endorsed the concept in a letter to Congress,[195] and NREN is the subject of a conference at Harvard University's Kennedy School in late 1990.[196]

Brian Kahin has observed correctly that network and database technologies blur the distinction between dissemination and access in the context of public information.[197] Electronic databases made available on networks are "published" in the sense that the custodian of the database takes affirmative steps to make the database available via the network, and the network is available to all its users and subscribers at their places of use like a published paper document is available to them there. On the other hand, the information content is not actually transferred to the user until the user makes a specific request. This looks more like access in that the original custodian of the information content keeps it until it specifically is requested.

The collapse of the dichotomy sometimes is labelled "publishing on demand." The collapse of the dissemination/access dichotomy through publishing on demand has several implications for electronic records management.

It eases the pressure for physical transfer of accessioned records to the National Archives because requesters can access the records electronically via a network wherever they physically reside.[198] Second, and probably more fundamentally, it blurs significantly the present distinction among publishing government materials, carried out by the GPO and NTIS; providing access to information under the Freedom of Information Act in response to discrete requests; and archiving information.

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[195] Byte, Dec., 1989 at 18.

[196] The author of this report is a participant in the conference.

[197] Kahin, Toward A Public Information Infrastructure: Information Policy and the Internet, Prepared for the U.S. Congress Office of Technology Assessment at 19 (contract number L3-5445.0, May 15, 1990) ("the breakdown of dichotomies in the network environment.")

[198] This may not be altogether true. The National Archives provides a safe, permanent place for storing records and ensuring their integrity. It thus performs a security function as important as its access and retrieval functions.

Publishing on demand--the blurring of the dichotomy between dissemination and access--means that the act of publication has much lower cost associated with it than paper publication. Assuming that appropriate type two, three and four value[199] has been added to the information to permit efficient retrieval on request, the act of publication and the cost of the act of publication is simply the cost of establishing an electronic link between the hardware and software where the information resides and the consumer. Typically this is done by designating specific documents or database elements as available on a network. Because type five, six, and seven value is not added until the information actually is requested, the cost of this kind of publication is much lower than traditional publishing and distribution.

It is tempting to suppose that future archival systems could simply retain all electronic information generated by agencies, establishing electronic links through an appropriate network or networks when the information is suitable for public availability. There are several problems with this vision, however. First, it would be difficult to find storage and processing capacity for the rapidly expanding quantity of electronic data. Moreover, it is not quite as simple as simply establishing an electronic link via a network. To make the information accessible, some kind of index must be generated, either a data dictionary coupled to the database-specific indexes, or inverted files for free text searching of textual documents.

Even if storage and telecommunications links were available, widespread incompatibilities among hardware, operating systems, communications protocols and application software would frustrate effective access to the information. Electronic information in agencies is defined and organized to support the conduct of day-to-day affairs. Third party users are unlikely to know enough about organization structures and responsibilities to be able to look for information in appropriate ways. Effective access requires technical and context documentation. Most real world computer applications are not well-documented, and even when they are, links must be created between computer documentation and agency documentation required under §552 of Title 5 United States Code.

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[199] *See* §IV(B)(2).

E. Impact of Emerging Freedom of Information Act Policies for Electronic Records

Administrative Conference Recommendation 88-10[200] impacts electronic records management in four major ways. First, Recommendation 88-10 strongly embraces the proposition that electronic information should be treated as agency records for FOIA purposes. The basis for this conclusion supports treatment of electronic information as records for records management purposes.

Second, it encourages agencies to design FOIA retrieval capabilities into computerized information systems from the outset. Designing FOIA capability into systems is one aspect of designing records management capabilities into systems from the outset. The major difference between FOIA and archival needs is that identification of information desired in connection with a FOIA request is made at the time of the request by the consumer of the information. Designation of information for records management purposes is done in advance, as a part of classifying types of information to be contained in a system, or as a part of the authoring step.

Third, Recommendation 88-10 encourages agencies to experiment with electronic techniques for improving public participation in agency rulemaking and adjudicatory proceedings. As this occurs, more of the public record public input to agency decisions will exist in electronic form. Moreover, the database structures necessary for effective management of public comments also will facilitate management of this information for archival purposes.

Finally, Recommendation 88-10 encourages agencies to use accepted standards for formats and implicitly encourages agencies to participate in improving standards. This is consistent with the need for better standards for agency electronic records.

F. What constitutes a record?

Electronic records management concepts are centered on the concept of a record copy of a document. It is natural to assume that information comes in packages called documents. But it has not always been so. Until the thirteenth or fourteenth centuries, information was primarily oral, although much valuable information, especially official records of church and state, was inscribed on a variety of media, ranging from clay tablets and papyrus to hand written parchment. Written information became important in the legal reforms initiated shortly after the Norman invasion of England, especially by Henry II. The printing press, once it widely was accepted, transformed social and cultural concepts of information again, leading to new packages such as newspapers and books. Gradually, new typographic forms emerged to facilitate the use of information by a broad range of consumers.

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[200] 54 Fed.Reg. 5207 (Feb. 2, 1989), to be codified at 1 CFR §305.88-10; Perritt, *Electronic Acquisition and Release of Federal Agency Information: An Analysis of ACUS Recommendations*, 41 Admin. L. Rev. 253, 310 (1989); Perritt, *Federal Electronic Information Policy*, 63 Temple L. Rev. 201 (1990).

Now cultural and social institutions have grown up around printing press technology, and it is natural to think of information issues only in terms of that technology.

The electronic information revolution is, however, as profound as the printing press revolution in its potential impact on cultural and social patterns for creating and using information. While new information paradigms have not yet emerged with sufficient clarity to be widely accepted, policy makers and designers of long term information policies should be wary of accepting printed information paradigms uncritically.

The appearance of on-demand publishing technologies[201] presents major challenges for any archive policy. If books and newspapers can be produced in many different versions, with press runs on the order of a dozen per version, should one archive all versions, and if not, which version should be archived? A compromise possibility is to archive the most extensive version, or possibly a master copy of all fragments that were included in any version, along with a kind of control document that would correlate document sections with particular versions, showing which section was included in which version.[202] The problem, of course, is the same problem associated with archiving any database: which state of the database is the archival copy?

Electronic records can be thought of as analogs of paper memoranda and reports, or they can be thought of as analogs of telephone conversations. The latter analogy obviates concerns with preserving electronic records because telephone conversations are not preserved as a part of records management and archives activities[203] even though the technology exists for recording telephone conversations and saving the recordings.[204] It may be that some electronic information volatility characteristics impose such challenges to records retention efforts that the telephone conversation analogy is the best place to end up. On the other hand, the paper memoranda and report analogy is clearly appropriate for electronic information possessing reasonable permanence in content, even though the final content may have evolved through many versions.

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[201] McGraw Hill is phasing in a new textual database and book manufacturing technology that can vary the content of a textbook for press runs of as few as ten copies. *See* McDowell, *Facts to Fit Every Fancy: Custom Textbooks are Here*, New York Times, October 23, 1989, at page D1. This is a major development towards on-demand publishing, representing a convergence of database and print media.

[202] This blends the publishing-on-demand issue with the compound document issues discussed in the next few paragraphs.

A more profound example of the inadequacy of customary information concepts is the impracticability of applying them to compound documents created by electronic technologies. In the future, the prevalent means of accessing information may be through a kind of master document which really is little more than a set of pointers to textual, graphics, and sound information stored in diverse places. Presently, a single query from a relational database is a precursor of that kind of compound document, although all elements of a database query usually represent similar forms of information.[205] Perhaps the most important long term objective is to develop conceptual frameworks and strategies for dealing with compound documents.

The Patent Office system[206] is an actual example of a compound document system. USGS maps may be another potential example, because of the desirability of representing maps as modules of small geographic areas. A large map would be a series of pointers to smaller area modules. Hypertext is another clear example.[207]

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[203] Of course, it is over reaching to characterize broad classes of electronic records as analogous to telephone conversations. Moreover, 36 CFR §1222.20 requires that significant decisions reached and commitments made over the telephone should be documented.

[204] Voice recordings are completely sequential in character, so retrieving an item of interest is very time consuming. In other words, voice recordings have no type two (chunking), three (internal tags and pointers), or four (external tags and pointers) value.

[205] *But see* dBASE Mac and other products that permit database fields to contain graphical images as well as text or numeric information.

[206] *See* H. Perritt Electronic Acquisition and Release of Federal Agency Information, Report Prepared for the Administrative Conference of the United States §III(F) (Oct. 1, 1988) (describing patent office system).

[207] Hypertext is a technique for linking different documents or materials with pointers that can be activated by a user. The linked materials may includes graphical images and sound, as well as text. Compound documents are collections of related materials the content of any one of which can change independent of the other materials in the collection. See H. Perritt, How to Practice Law With Computers at 261, 395 (1988 & 1990 Supp.). Both hypertext and compound documents are analogous to a master contract, all of the terms of which are incorporated by reference, as they may be amended from time to time.

At this point, only questions can be posed to frame the inquiry. What is the relevant information for historical purposes: the state of the database against which pointers were executed? A collection of pointers is one unambiguous representation at a point in time. But pointers alone lack meaning unless one can restore their referents. Should the strategy be to save transactions rather than databases? Then there is no context.

These issues are not unique to federal electronic records management; they will be pervasive as compound documents come into wider use.

One possibility, of course, is that the new information technologies require people to abandon their preoccupation with the state of information at a particular point in time as is represented by a paper document. But if this concept is abandoned, it is not clear how historical developments and change can be recorded.

On the other hand, the new technologies permit more information to be captured about the processes of using information than is possible with paper documentation, which shows only what the information was, not how it was used or by whom.

Some of the techniques developed for managing and archiving audiovisual materials may be useful models for compound documents, although of course, they do not require the management and accessibility of text and sound and video together.

1. Proposed taxonomy

The following taxonomy is one way of thinking about electronic formats from a records management perspective, according to their relative content volatility and format complexity:[208]

a) electronic mail messages

b) word processing documents [209]

c) content of electronic databases

d) compound documents with relatively static components, like maps

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[208] Format complexity increases as more of the nine types of value, addressed in §IV(B)(2), are added.

[209] Both word processing documents and electronic mail messages have relatively static content and relatively simple formats. Word processing documents are more likely than electronic mail messages to have format features like typeface changes, style sheets, headers and footers and footnotes. Word processing documents also are somewhat more dynamic in that there are more likely to be multiple drafts of a word processing document than of an electronic mail message.

e) compound documents with volatile components, like statistical summaries linked to spreadsheets or databases.

The entries on the taxonomy represent an increasing level of structural complexity. As one ascends the list, the challenge is in deciding what to retain, i.e., what is the "record," and in specifying standards to use for information interchange. Retail electronic information products are difficult to position on the list. Some products, like Census CDROM disks offered to the public, are entirely static, because they are frozen in their physical manifestation. Others, however, like dialup bulletin boards such as USDA's EDI, are inherently volatile.

EMail is a particular problem because users of EMail think of it more like telephone interaction than written exchanges.[210] The problem thus is not developing the technical capability to retain EMail messages for their potential historical value; the problem is in developing user acceptance that EMail messages may be subject to "capture."[211]

Growing use of EMail and development of systems to archive EMail messages have a potential to expand the scope of the historical record of agency decisionmaking significantly, while also presenting the risk of overwhelming archival systems with too much information. The risk can be mitigated by developing automated record schedules that save EMail messages only between certain persons, dealing with certain subjects, or both.

2. Shift toward database paradigm

The new technologies have stimulated a gradual and barely perceptible shift from free-form textual information into databases. This undermines traditional assumptions about the nature of databases. The EDGAR system is a strong example. Electronic mail, for example makes textual information look sort of like a database, because certain addressee, author, and subject information is fielded.

Growing use of hypertext and hypermedia concepts will increase the convergence between free-form and database paradigms. A "database view" and a "virtual document" - really is the same concept.[212]

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[210] *See* U.N. Report at 8-14.

[211] *See* U.N. Report at 8-14 (users perceive EMail like telephone conversations, the recording of which is generally unethical if not illegal).

[212] C.Dollar, The Impact of Information Technologies on Archival Principles and Practices: Some Considerations at 7 (delivered at University of Macerata, Macerata, Italy, Sept. 5, 1990) [*hereinafter* Dollar Macerata Paper].

Will new type databases constitute the only evidence or the best evidence of how government works? For example if senior policy officials manipulate budget options in a Lotus 123 spreadsheet? Is not the spreadsheet itself the best evidence of how policy was made? Saving only the content of spreadsheet cells, without saving the formulas or recording the way the data was displayed to the policymaker in the spreadsheet format may obscure the decisionmaking process.

The question of when to take a snapshot of a dynamic database is not unique to electronics records management or electronic archives. Indeed, knowing what the contents of a database were at a particular time is essentially the question that makes electronic signatures and Statutes of Frauds difficult. How can one prove the state of an electronic record as of a particular instant? In general, using snapshots of dynamic data is not an entirely new problem. The white pages of the telephone book, for example represents such a snapshot.

G. Copyrights

One difficulty in moving toward electronic archives is the possibility that intellectual property rights in public data, data structures, or retrieval processes will inhibit appropriate levels of public access. Two underlying intellectual property issues are involved with this concern: first, whether public information can become private intellectual property when it becomes part of a compilation authored by a private entity, and whether intellectual property interests in retrieval processes (software, formats and indexes) may be used to retrieve public information with which they are associated without infringing private sector intellectual property interests.

Opposing these concerns about intellectual property impeding public access are concerns to stimulate private sector investment in making electronic public information more readily accessible. In some cases federal agencies create incentives to stimulate investment in electronic publishing of public data. In such cases, as ACUS Recommendation 88-10, paragraph F recognizes, a sponsoring agency may consider protecting markets for private sector providers prepared to make a commitment to appropriate product features. Such arrangements may permit a private entity to reserve a copyright[213] or other proprietary interests in specific value added features,[214] but not in the raw agency information or in value-added features developed by the agency.

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[213] Under the Copyright Act of 1976, an information provider under contract to the government is entitled to obtain a copyright in the public information, See H.R.Rep. 94-1476, reprinted in 1976 U.S. Code Cong. Admin. News 5671-5672, (construing limitation on copyright of government works not to prohibit copyright of government-commissioned work produced by a

These intellectual property interests should not be protected in a way that eliminates public benefits from government-funded development or restricts the public availability of public information. For example, members of the public should be permitted to use value-added features to facilitate disclosure-level information release, much as libraries are permitted to disclose copyrighted works to consumers while not interfering with copyright owner rights, by prohibiting commercial exploitation by a library borrower.

The potential conflict between protection of intellectual property and ensuring public access to archived electronic information is especially acute when new formats are involved. It is important, on the other hand, for agencies to embrace new formats so that the public can have the benefits of the new format. The new formats can be embraced only by respecting intellectual property. Intellectual property protection can impede public availability in three ways:

- because the existence of the intellectual property prohibits agency release of the information to the public. This is unlikely because copyright interests alone should not exempt information from accessibility under the FOIA.[215]
- because the agency or the user cannot get the proprietary software needed to use the information, either because it is no longer in print, or because it is too expensive.
- because the proprietary software needed to use the information is incompatible with the user's or the agency's current hardware or operating systems

H. Use of Electronic Records as Evidence

Public records serve an important evidentiary role in resolving disputes among citizens and between citizens and the government. It is important therefore that public records be accepted by dispute resolution tribunals. Changing to electronic formats should not impede the acceptability. There is

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contractor; recognizing that "denial of copyright protection might, in some cases, hamper the production and publication of important works.")

[214] The value added concept is recognized in copyright law through the eligibility of derivative works for copyright protection.

[215] *See* Perritt, 63 Temple L. Rev. at 234-40 (explaining treatment of copyright protection under FOIA exemption 3, 5 U.S.C. §552(b)(3)).

no reason to be concerned that well designed electronic records systems will present any new problems with admissibility of electronic records under the rules of evidence.

A major difficulty in appropriate records management strategies is unfamiliarity of the government's lawyers with the technology and with conclusions reached about legal treatment of the technology. For example, agency lawyers repeatedly "reinvent the wheel" regarding admissibility of electronic information and the internal procedure necessary to authenticate electronic information offered as evidence. Similar examples involve electronic signatures.

There is a natural tendency when a new technology raises legal concerns to forget basic principles and to embark on unnecessarily difficult and complex de novo searches for new legal principles to govern the new technologies. This natural tendency should be resisted. A de novo inquiry is not necessary; the areas of concern unique to electronic methods can be addressed best by focusing narrowly on the differences between electronic techniques and conventional techniques.

Reliability of computer records is suspect because of the inherently greater volatility of computer and telecommunications data, compared with written data. But relative reliability of different means of proving legal facts is not a new problem for the law. Historically contract law promoted reliability of contract proof by insisting on written documentation of certain contracts under the Statute of Frauds[216] or of other signature requirements. The same underlying issues are addressed by the parol evidence rule[217] and by rules of evidence pertaining to the inadmissibility of hearsay, subject to exceptions for business records. The standard for the business records exception to the hearsay rule is not necessarily the same as the standards for the Statute of Frauds or the parol evidence rule. Nevertheless, all three legal concepts share a common concern with reliability. All three recognize that some forms of evidence have greater reliability than others.

Document authentication[218] or proof of the inclusion of particular terms in documents requires that the communications making up the transaction be recorded and retrievable in some reasonably permanent way. Statutes of frauds require a "writing" as the permanent means of recordation. Statutes of frauds also require signatures, which also are intended to serve an evidentiary purpose.

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[216] *See generally* Restatement (Second) of Contracts ch. 5, statutory note at 281 (1979) (reviewing state statutes and text of original statute).

[217] The parol evidence rule bars evidence of prior or contemporaneous oral statements to vary the terms of an integrated written contract. See Gatins v. NCR Corp., 180 Ga.App. 595, 349 S.E.2d 818, 820 (1986) (interaction between parol evidence rule and Statute of Frauds barred parol evidence to supply duration term of written employment terms).

[218] Authentication is proving that a document is what it purports to be, that the proffered writing is not a forgery.

Writings and signatures serve somewhat different purposes, although their purposes also overlap to a considerable degree. A signature protects against outright disavowal of a document by a party who denies authorship of a writing. A writing memorializes the terms of a document and thus protects against disputes over the terms of a document, admitting that a document exists. Reliability and authentication issues are related to the signature requirement under the Uniform Commercial Code.

Hypertext and compound documents are emerging concepts that represent a high level of incorporation by reference--and major challenges in terms of creating a reliable transaction record.

The Justice Department has not provided recent official guidance on the admissibility of electronically filed federal records as evidence. The most recent effort by the department seems to be November 6, 1986, draft memorandum.[219] The points made in the draft are relatively noncontroversial. The provision of the NARA regulations concerning judicial acceptance of electronic records is a step in the right direction, to give clearer and more official guidance on evidentiary treatment of electronic records.

The often neglected first step is to determine the purpose for which the electronic record would be used: to prove verbal conduct with legal significance,[220] to prove the content of an electronic transaction, such as an electronic contract, or as evidence of whether some other fact exists. Only the third purpose involves the hearsay exclusion. Even in that circumstance, electronic records are admissible under the general rules of evidence applicable to hearsay and document authentication.[221]

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[219] By George S. Kondos, "Admissibility of Electronically Filed Federal Records as Evidence: a Guideline for Federal Records Managers of Custodians (Justice Management Division, Office of Information Technology, System Policy Staff) (Nov. 6, 1986).

[220] Proving intent, the making of a representation, or a defamatory communication are examples.

[221] *See* Federal Rules of Evidence 1001(1) (defining writings and recordings to include "magnetic impulse, mechanical or electronic recording, or other form of data compilation"), 1001(3) (defining original to include print out or other output readable by sight known to reflect data stored in the computer or similar device accurately), 1001(4) (providing for admissibility of duplicate which includes counterpart produced by mechanical or electronic rerecording which accurately reproduces the original), 1005 (permitting introduction of copy of official records certified by a witness who has compared it with the original), 803(6) (16) (excluding from inadmissibility as hearsay various categories of business records and official records), 901(b) (giving examples of authentication of records); and 44 U.S.C. §3301 (explicitly defining federal records to include machine readable materials regardless of physical form or characteristics).

Despite the applicability of these general legal concepts, however, because electronic records are particularly susceptible to purposeful or accidental alterations, or incorrect processing, authenticating them may be more difficult than for paper records using the same standards of authentication.[222]

I. Should the President Be Treated Differently From Agencies?

The only policy reason[223] to treat presidential records differently from other agency records are: (1) presidential records are not covered by the FOIA, and (2) access and dissemination issues are much more sensitive politically.

Presidential libraries[224] present some special problems and opportunities in terms of records decentralization and standard procedures. Historically, presidential libraries have been dispersed throughout the country, one location for each President. When the libraries contain only paper records, this decentralization represents burdens for users of the information. As more of the contents of presidential libraries becomes electronic, however, telecommunications access can facilitate use of information even if the presidential library itself is physically remote from the user.

In order for this increased electronic accessibility to be a reality, however, uniform standards must be used by all presidents. Because of the discretionary authority of the president and his immediate subordinates, it is more difficult for agencies like NARA and GSA to impose burdensome government-wide procedures and requirements on presidential personnel. On the other hand, because of the virtually complete turnover of presidential personnel between administrations, continuing organizations like the White House Office of Administration, OMB, and the White House Communications Agency have potentially great influence on technical standardization.

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[222] *See* United States v. Scholle, 558 F.2d 1109 (8th Cir, 1977) (computer storage requires more comprehensive foundation for admissibility, including testimony of procedures for input control such as tests for insuring accuracy and reliability); United States v. Vella, 763 F.2d 86 (5th Cir. 1982) (implying disagreement with *Scholle*; computer data should be treated like any other record of regularly conducted activity); United States v. Rosso, 480 F.2d 1228 (6th Cir. 1973) (authentication of computer records requires establishing reliability and trustworthiness of information put into the computer such as showing the input procedures used, tests for accuracy and reliability, showing that an established business relies on the computer as records in the ordinary course of carrying on activities, subject to opponent cross examination concerning input and accuracy); United States v. Fendley, 522 F.2d 181 (5th Cir. 1975) (preparer of record not required to authenticate).

[223] As §II(B)(7) explains, the existing statutory framework treats presidential records differently from agency records.

[224] Presidential records traditionally are archives in Presidential libraries rather than in National Archives facilities containing agency records.

A useful conceptual model is to think of each presidency inheriting a computer system for its records much as the presidency inherits the White House. The computer system would be designed to meet presidential records managements needs. The working records of the presidency would be managed by this computer system, which would be transferred in its entirety to the presidential library, wherever it might be. Standard features of the standard presidential computer system would include a telecommunications interface that simply could be plugged into publicly accessible telephone lines at the presidential library, and security modules that could be set to screen standard document flags indicating public accessibility.

J. Standing

One of the current controversies over the law of electronic records management is whether private citizens have standing to sue for enforcement of records management statutes. If they do not have standing, whether agencies comply with obligations to retain records is entirely up to agency heads, the Archivist of the United States, and the Attorney General.

Federal courts have power only over cases or controversies, according to Article III of the United States Constitution.[225] Standing has been described as amorphous, but its conceptual contours are reasonably clear in the administrative law context under a line of cases beginning with *Association of Data Processing Organizations v. Camp*.[226] A plaintiff must have injury in fact, within the zone of interests protected by a statute, the injury must be causally related to challenged agency action, and the judicial remedy sought must be able to relieve the injury.

Some statutes create private rights of action, expressly or impliedly.[227] Other statutes do not create private rights of action but create rights which can be enforced under the Administrative Procedure Act. The Administrative Procedure Act creates a private right of action for review only of agency decisions that cause legal injury.[228] Without injury to interest recognized by another statute or by the common law, there is no right to review under the APA.

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[225] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[226] 397 U.S. 150 (1970).

[227] *See* Cort v. Ash, 422 U.S. 66 (1975); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 373, 377 (1982) (emphasizing intent component of *Cort*); Omni Capital v. Wolff, 484 U.S. 97 (1987) (applying *Cort* and *Merrill Lynch*).

Of course Congress can expand standing by expanding legal rights. A perfect example of such expansion is the Freedom of Information Act. The FOIA creates a new right and thereby a new category of legal injury. Anyone showing infringement of this statutory right has standing to sue. There are two ways that records retention plaintiffs can have standing. One way is to demonstrate injury to interests protected by the records statutes, as in *American Friends Service Committee v. Webster*.[229] Another way is to show indirect injury under the FOIA. The problem for the *Armstrong* plaintiffs was that they requested retention of records rather than access to them. Refusal of the retention request was not directly an infringement of rights granted by the Freedom of Information Act, and the *Kissinger* Court held that the records management statutes created no private right of action.

The records statutes almost certainly are aimed at protecting the public interest in having certain governmental records preserved for historical purposes or for accountability purposes, however, as the D.C. Circuit held in *American Friends Service Committee v. Webster*.[230] This is a sufficient right to support reviewability of agency action under the APA.

Independently, it is plausible to suppose that if someone requested records under the Freedom of Information Act and the government promptly destroyed the records, that would injure interests recognized by the FOIA. Or, if an agency anticipates a FOIA request and destroys the documents, it is at least plausible that would be an injury under the FOIA.[231] Those hypotheticals are not too far removed from the theory of *Armstrong*.

Broadening standing so that private citizens could sue to enforce the records statutes would increase the attention given to records management responsibilities, and this would improve matters. The risks, however, are that NARA would loose control to the courts over the definition of records and the development of guidelines for appropriate information management procedures, and that records that should be disposed in a broader perspective will be required to be maintained because of litigation over them.

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[228] Either "legal injury" (presumably meaning injury as recognized at common law) or injury in the sense of being "adversely affected or aggrieved . . . within the meaning of a relevant statute." 5 U.S.C. §702.

[229] 720 F.2d 29, 57 (D.C.Cir. 1983) (finding standing to seek review of agency compliance with records management and disposal statutes under Administrative Procedure Act).

[230] 720 F.2d 29, 57 (D.C.Cir. 1983) (finding standing to seek review of agency compliance with records management and disposal statutes under Administrative Procedure Act).

[231] It may be noted that the *Armstrong* plaintiffs' reason for asserting injury to rights protected by the record statutes was that at least some of the electronic records in the PROFS system were presidential records and therefore outside the coverage of the FOIA.

K. Standard of Review

The standard of review of agency records management decisions undoubtedly is the arbitrary and capricious standard under §706(2)(A) of the APA.[232] Usually, one can recharacterize arbitrary and capricious action as ultra vires action, which is judicially remediable under §706(2)(C) of the APA.[233] For example, if an agency fails to consider a statutorily mandated factor, such failure is arbitrary and capricious, and the decision reached without consideration of a mandated factor also is in excess of statutory authority or "ultra vires." The ultra vires theory is useful to a challenger however, only when an agency needs statutory authority for its conduct. An agency may have inherent authority to arrange for its records without considering specific factors under an affirmative grant of authority. Agency officials may have the authority to destroy computer files without being given that authority affirmatively by a statute. There are, however, statutory restrictions on records destruction.[234] Therefore, destruction of electronic records without NARA authority can be characterized as ultra vires on the theory that a statutory mandate or prohibition removes any inherent authority to act contrary to the statute.

L. Standards

Standards are important because they reduce the burden on the archives to maintain multiple retrieval hardware and software systems, and because they facilitate agency design of records management components of information systems.[235] Information in electronic form can be transferred in two basic ways: by exchanging physical media such as tapes or diskettes, or by communication links. Exchange of physical media requires more standards than communication links, but generally offers higher bandwidth.[236]

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[232] 5 U.S.C. §706(2)(A).

[233] Such action also may be enjoinable under the doctrine of American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) (once legal right is shown, federal courts have inherent equitable power to enjoin ultra vires action).

[234] *See* 44 U.S.C. §3303A and 44 U.S.C. §3314 (prohibiting destruction of federal records without NARA approval).

[235] *See generally* Protocols Standards and Communication, Inc., The Application of ODA/ODIF Standards 3, 5 (Mar. 1988) (report prepared for the National Archives of Canada)

At the present time, flat file ASCII is an acceptable standard for text information exchange. Increasingly, however, agency information systems accommodate higher levels of typographic format information and compound documents. Soon, losing these value enhancements when information is transferred among agencies are transferred to the National Archives will be unacceptable. More sophisticated text standards already are available in concept. For example, SGML,[237] the subject of an NIST FIPS,[238] can save agencies the costs of developing text structuring formats from scratch. Use of SGML and standard CDROM format and retrieval conventions could increase public access to electronic information in the archives greatly.

Present methods for transferring database information already are inadequate. One can transfer database information in three ways: (1) in the limited form of reports on query results through query languages such as SQL; (2) from active database to active database, which makes transfer independent of proprietary software and hardware; or (3) through flat files accompanied by detailed documentation.[239]

Section IV(D) noted that long term electronic records management philosophies must accommodate changes in the form in which information is recorded and communicated. Especially challenging is adaptation to compound document concepts. Compound documents bear certain resemblances to databases in that they are dynamic and the meaning of a particular entry may depend on the context represented by the content of other entries. A less

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[hereinafter "Canadian ODA/ODIF Report"] (ability of archives to perform mission depends on ability to access formats maintained by agencies).

[236] Bandwidth is the rate of information transfer. I can transfer 1.6 megabytes of information almost instantaneously by handing you a 3.5" diskette. The same quantity of information would take somewhat more than an hour to transfer on a 2400 baud communications link.

[237] Standard Generalized Markup Language.

[238] FIPS Pub. 152.

[239] *See generally* National Computer Systems Laboratory National Institute of Standards and Technology, Framework and Policy, Recommendations for the Exchange and Preservation of Electronic Records (March 1989) [hereinafter "Framework"] (by Margaret H. Law and Bruce K. Rosen); Judi Moline, Attachment C to Framework: Recommendations for Document Transfer Standards and their Integration into National Archives Policy (January, 1989) (prepared by the Systems and Software Technology Division of NIST); Wilma M. Osborne, Bruce Rosen and Leonard Gallagher, Attachment D to Framework: Recommendations for Database and Data Dictionary Standards and their Integration into National Archives Policy (prepared by the Information Systems Engineering Division of NIST). See NIST Report §3.2.1.1 at 16-17.

challenging technological development, but nevertheless one that requires more of format standards than a word processing document is the concept of an electronic document (like an electronic contract) structured to permit electronic technologies to be used for legally significant transactions.

The need for a format standard for legal and government information will increase as more legal and government information is communicated and stored in specialized electronic documents[240] structured to permit expert system use.[241] The problem is similar to that relating to databases. Electronic documents are structured, and the meaning of a particular part of the document may not be apparent from the context, but only from knowledge of what the contents of a particular field mean. One can, of course, consider the need for standardizing electronic documents simply as a part of a larger issue of creating format standards for databases. An electronic tax return becomes a part of databases maintained by the IRS, and document generators or diagnostic systems in law firms or agencies would collect the files representing particular client matters or transactions and maintain them in databases.

The difference between electronic documents and databases is that a database usually is composed of many records and is useful in the aggregate. A single electronic document, in contrast, is significant independent of other electronic documents.

Compound documents and electronic legal documents present somewhat different problems for records management. The most difficult problem presented by compound documents is dynamic content. The content of the element incorporated by reference may change even though the cluster of pointers representing the "master document" remains the same. Electronic legal documents are not dynamic in this sense, but they have no meaning independent of a look-up table defining the structure of fields and the meaning of codes in the fields. Thus both compound documents and electronic legal documents raise some of the same problems presented by databases. One practicable solution for electronic legal documents is to retain them in flat file form along with a set of definitions for structure and fields values. A solution to the standards problem for compound documents is much more challenging.

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[240] Electronic tax returns filed with the IRS or electronic 10K forms filed with the SEC are electronic documents. The file containing a user's answers to the questions asked by a legal expert system, say a will generator, or a system for evaluating social security disability claims, also is an electronic document.

[241] Standards for legal information, like EDI or SGML, are forms of knowledge representation. One must identify the attributes necessary to represent, say, a contract. Those attributes are the data elements in an EDI transaction set. Even more important, in order to make the information in an EDI transaction set machine processable, one must standardize the values that are acceptable in any particular field. Determining whether a particular contract term should be represented by a particular value from a predefined set in, say, the time-is-of-the-essence field, is a fairly high order of decisionmaking about how to represent legal knowledge. It is analogous in some ways to the quality of judgment exercised by a headline writer in a daily newspaper. The headline writer must be adroit with language in order to fit the headline to the space available, and he or she must be a quick study on what the story to be headlined is really about.

It is not, of course, easy to specify a standard that accommodates future, unforeseeable technologies. But the challenge has been met in the past. Standards for magnetic tape storage developed in the 50's served well for thirty years, and the flat file ASCII standard for text and databases has been adequate until recently. While there are major uncertainties about the best ways to represent, display, transmit, and store graphical images,[242] good federal government standards can drive the market and create economic incentives for vendors to adhere to the standards rather than diverging on proprietary approaches to obtain competitive advantage.

1. Standards Activities

The National Institute of Standards and Technology ("NIST") prepared background papers for NARA in the fall of 1989 addressing such things as standards for transfer of textual documents.[243] The purpose of the NIST report was to identify a logical architecture for the representation, transfer, storage, and access, of electronic records to be accessioned by NARA.[244] The NIST report notes that "records that have been adequately preserved and physically maintained may still be lost due to lack of indexing information. To be accessible, electronic information must have record indexing, cross referencing, and descriptive information available.[245]

The NIST study concluded:

1. Electronic information accessioned by the Archives will not be usable over a long period of time unless format standards are developed and enforced by NARA. Otherwise machine

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[242] It should be noted that optical storage does not mitigate the need for standards; it increases it.

[243] National Computer Systems Laboratory National Institute of Standards and Technology, Framework and Policy, Recommendations for the Exchange and Preservation of Electronic Records (March 1989) [hereinafter "NIST Report"] (by Margaret H. Law and Bruce K. Rosen); Judi Moline, Attachment C to NIST Report: Recommendations for Document Transfer Standards and their Integration into National Archives Policy (January, 1989) (prepared by the Systems and Software Technology Division of NIST); Wilma M. Osborne, Bruce Rosen and Leonard Gallagher, Attachment D to NIST Report: Recommendations for Database and Data Dictionary Standards and their Integration into National Archives Policy (prepared by the Information Systems Engineering Division of NIST).

[244] *See* NIST Report §1.3 at 3.

[245] NIST Report §1.2 and 2.

obsolescence will prevent access to information stored in proprietary formats--even "industry standard" formats like MSDOS 5.25" 360 kbyte magnetic disk, or Word Perfect--over time.

2. NARA should use an SGML based standards family for textual information, including SGML, DSSL, SPDL, and ODA/ODIF.[246] Together, these standards define document elements referred to by SGML tags and permit compound documents to be represented, transferred, stored, and retrieved.
3. Databases should be transferred in flat file form, with accompanying electronic documentation of the database schema. NARA should select a standard database to use for retrieval, and should update media and technologies used to maintain the electronic database instructions more frequently than the content of the database transferred. Newly adopted IRDS should be adopted by NARA. NARA should maintain in electronic form the necessary descriptive and indexing information.[247] The report recommends creation and maintenance of a NARA-wide data administration function using data dictionary techniques.[248]
4. NARA should review the suitability of NARA electronic media and format procedures in view of current technology at approximately five year intervals. NARA should consider transferring information from older media to newer media,[249] as technology changes.

NARA responded and commented on the NIST recommendations in June 1990.[250] NARA agreed on the utility of standards, though it was somewhat less optimistic than NIST about the utility of moving quickly to adopt standards for either text or databases. NARA expressed a preference, explaining the basis for its preference, for working with standard setting organizations to refine the evolving standards for text and database transfer, for waiting until existing standards are reflected in commercial products, and for affirmative steps to encourage agency experimentation and demonstration programs for the more promising standards. The specifics of these NARA intentions are treated in the recommendations section of this report.

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[246] Each of these acronyms is explained in the subsections following this overview of the standards problem.

[247] *See* NIST Report §3.2.1.2 at 18.

[248] *See* NIST Report §3.2.2.1 at 20.

[249] *See* NIST Report §5.3 at 37.

[250] NARA Technical Report No. 8 (June 1990).

The NARA response focused on certain important implementation issues more than the NIST Report. Simply adopting existing standards is not necessarily practicable. For example, a Postscript-like SPDL has a large amount of overhead. In one experiment, the Postscript version of a file was about forty times longer than the original file. In the author's experience, the Postscript version of word processing files regularly is at least five times as long as the word processing file itself. When storage is an important consideration, this kind of overhead is unattractive.

A major impediment to the adoption of standards by commercial software vendors is uncertainty with respect to the market for products embodying the standards. Federal agencies and the archives represent a substantial market. An aggressive approach by the federal establishment can hasten the maturation of standards. A wait and see attitude, on the other hand, actively discourages the maturation of standards.

It well may be enough, for example, to stimulate word processing software vendors like Microsoft and WordPerfect to add ODA/ODIF features to their leading products or to add an SGML conversion feature if the federal establishment were to embrace these standards.[251]

The National Archives of Canada has identified the following international standards of particular interest for government archives and electronic records management purposes: International Standards Organization (ISO) Technical Committees TC46 (documentation), TC97 (information processing), TC154 (documents and data elements in administration, commerce and industry), and TC184 (industrial automation systems). TC97 is divided into the following subcommittees: SC2 (character sets and information coding), SC2 (telecommunications and information exchange between systems), SC15 (labeling and file structure), SC18 (text and office systems), SC20 (data cryptographic techniques), and SC 21 (information retrieval, transfer and management for OSI).[252]

Of somewhat less interest but nevertheless pertinent are certain study groups of the CCITT: SG II (operational aspects of telematic services), SG VII (public data networks), SG VIII (terminal equipment), SG X (languages and methods for telecommunications applications), SG XII (SDN and telephone network switching and signaling), and SGXVIII (digital networks including ISDN). SGVII produced X.25 and X.400 and other X series standards for the transport and session layers of the OSI model. SGVIII is responsible for teletext, videotext, and facsimile recommendations, including T.400, "document transfer and manipulation," concerned with document architecture in the interchange of documents.[253]

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[251] Substantial trade press attention has been given, for example, to the GOSIP standard, and further elaboration of this standard to embrace SGML as well as ODA/ODIF could be expected to encourage private software development. See generally, Technical Information Paper No. 8 at 15 (reviewing status of GOSIP and its inclusion of ODA/ODIF but not SGML).

[252] McDonald 1988 Archivist Paper at 5.

The following standards are of particular interest: ODA/ODIF, MACDIF (Map and chart digital interchange format), ISO8211 (data descriptive file for information exchange), FTAM (file transfer and access methods) and TOP (technical and office protocols).[254]

2. OSI

The International Standards Organization is developing an Open Systems Interconnection (ISO/OSI) standard divided into seven layers.[255] Layer 1 defines the physical and electrical connection between the computer and the network and defines the network's topology. Layers 2 and 3 define the data link, in terms of the structure of packets used to address other stations and to transmit and receive information, and how packets are routed and relayed. Layer 4 defines how physical locations on the network can be addressed. Layers 5, 6 and 7 define how applications interface with the network.[256] OSI is not completely defined and therefore is not widely available as a useful standard in actual products.[257] OSI is, however, a widely accepted conceptual framework for thinking about specific standards and conventions for communicating and transferring information among different computer systems.

3. ASN.1/OSI

Abstract Syntax Notation 1 (ASN.1)[258] defines documents in the Office Document Architecture ("ODA") and Office Document Interchange Format ("ODIF") and permits data interchange in the Information Resource Dictionary System ("IRDS")[259] and Remote Database Access ("RDA") standards. NIST used ASN.1 for the document transfer prototype software developed in its report because ASN.1 is sufficiently robust to be useful for defining arbitrary and complex data types and values.[260]

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[253] McDonald 1988 Archivist Paper at 5.

[254] McDonald 1988 Archivist Paper at 6.

[255] *See* ISO 7498-1984, Information processing systems, Open Systems Interconnection Basic Reference Model, available from Sales Department, American National Standards Institute, 1430 Broadway, New York, NY 10018. (212) 642-4900.

[256] *See* Byte, July 1987, at 152.

[257] See generally H. Perritt, How to Practice Law With Computers chap. 3 (1988 & Supp. 1990) (explanation of standards).

[258] ASN.1 is a component of OSI application layer protocol level.

[259] IRDS is defined in FIPS 156.

4. IRDS

An Information Resource Directory System ("IRDS") is an enhanced data dictionary. A data dictionary is a system database that contains definitions and descriptions of data stored in user databases. A data dictionary might include the following kinds of information about a particular document, file, or data value:

-- Category of the data item
-- Relationship of the data item to other data items
-- When and by whom the data were created
-- When and by whom the data were modified
-- Total number of modifications since the data were created
-- Description of the data, such as format and range of values
-- Databases or files in which the data items appear
-- Location of the data item in those databases or files.[261]

Data Dictionaries sometimes are integral with database management systems, and sometimes they are developed and implemented separately.[262] An IRDS typically has data organized in four levels. The lowest application level has specific values corresponding to entities in attributes.

The second IRD level has descriptions of the types of data stored at the first level. This description is known as a "schema." The third level has data constituting the schema for the IRD level, and the fourth level has data defining the schema for the third level.[263]

The IRDS concept would permit a uniform approach to a logically standardized, centralized, shareable database for all catalogued information.[264] Each agency might maintain a description of information resources in a directory using a standardized IRDS. Then, the archives organization would access the descriptions through IRDS service interface. Nonelectronic as well as electronic records can be included.[265] The same approach could be used to manage transfer of electronic information from the agency to the archives.[266] A combination of IRDS and SQL or a specification of SQL features would permit easier archives access to agency records, and public access to both.[267]

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[260] NIST Report §2.3.3 at 8. NIST also reports that ASN.1 is expected to be incorporated into SQL within a few years.

[261] McDonald 1989 Archivist Paper at 3-4 (close paraphrase of description).

[262] McDonald 1989 Archivist Paper at 4.

[263] McDonald 1989 Archivist Paper at 4.

[264] *See* McDonald 1989 Archivist Paper at 5; *see generally* 55 Fed.Reg. 11424 (Mar. 28, 1990) (NIST release on POSIX, discussing data base management standards SQL (FIPS 127) and IRDS (FIPS 156)).

[265] McDonald 1989 Archives Paper at 5.

The basic scenario could involve all departments and agencies using a standardized IRDS along with SQL. The original database environment need not be compatible with the archives system; the only requirements are that both support the IRDS and SQL standards.[268]

The IRDS approach would facilitate determination of data holdings by providing a single standardized dictionary of data holdings, eliminating the need either for hard copy indexes or for separate formats for dictionaries of each agency database.[269] IRDS also would facilitate the appraisal process because it includes structures specifically oriented toward appraisal, such as structures containing information about provenance and original order or context of the records[270] Acquisitions will be facilitated by IRDS because of the potential for standardizing export/import files.[271]

Most significantly, IRDS provides a feasible way for preserving the long term accessibility of agency created databases without the need to maintain an exploding universe of database management systems used to create the databases.[272]

The status of the IRDS standard is as follows. The ISO version has diverged to some extent from the ANSI version, but the ANSI version is more mature, likely to result in commercial products early in the 1990's.[273] A Canadian archives commission study of IRDS resulted in six recommendations, including development of a pilot project based on the ISO, IRDS, and acquisitions of a commercial ANSI, IRDS product.[274]

In the U.S. Accredited Standards Committee X3H4 voted in 1983 to adopt the National Bureau of Standards draft of a Federal Information Processing Standard for data dictionary systems as the basis for further work on IRDS. Since then, NBS and X3H4 have worked together to develop a Draft Proposal American National Standard ("DPANS") for information resource dictionary systems. The DPANS, IRDS was approved as ANS X3.138 in October 1988. NIST officially adopted X3.138-1988 as FIPS156.[275]

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[266] McDonald 1989 Archivist Paper at 6.

[267] McDonald 1989 Archivist Paper at 7.

[268] IRDS status report at 5.

[269] Protocols Standard and Communications, Inc., Situation Report on the Information Resource Dictionary System ("IRDS") (March, 1989) (PAC-ARC002-1 prepared for the National Archives of Canada) [hereinafter "IRDS Situation Report"].

[270] IRDS Situation Report at 30.

[271] IRDS Situation Report at 30.

[272] *See* IRDS Situation Report at 31.

[273] *Id.* at 34.

[274] *Id.* 37-38 (recommendations d, f).

5. SQL

Structured Query Language ("SQL") is a database language standard embraced by the American National Standards Institute ("ANSI.") SQL has three components: a data definition language, a data manipulation language, and a data control language. Each of the components can be executed directly or indirectly, through a database application development language.[276] SQL is a programming language, designed to implement the relational database model faithfully. It permits a database structure to be specified unambiguously, and for queries to be expressed generically. Microcomputer and mainframe computer software developers are rushing to include SQL compatibility in their products.

6. File Transfer, Access and Management ("FTAM")

ISO Standard 8571, File Transfer, Access and Management ("FTAM"), provides the capability to exchange data files and to manipulate data files remotely. It specifies an OSI application layer protocol, capable conceptually of accommodating relational and network databases, as well as ODA/ODIF documents.[277]

7. EDI

Electronic Data Interchange (EDI), is a set of standards generally grouped under ANSI X12. Under the standards developed by EDI and ANSI X12 groups, a growing proportion of businesses contract with each other electronically by exchanging prescribed data sets[278] between their computers. A purchase order might be issued electronically, or a request for bids and responding bids exchanged electronically.

EDI originated as a family of standards for exchanging numerical information as a part of electronic business transactions. EDI's heritage is in database schemas, where the meaning of a data element is determined in part[279] from its position in a stream of data or in a file. An EDI standard might say[280] that the first seven bytes are the message number, the next ten bytes the purchase order number, the next twenty five bytes a textual description of the product ordered, the next six bytes the total price, and the final ten bytes the signature.

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[275] *See* 54 Fed. Reg. 13729 (Apr. 5, 1989).

[276] *See* H. Perritt, How to Practice Law with Computers 389 (1988 & Supp. 1990).

[277] *See* Canadian ODA/ODIF Report at 8.

[278] These prescribed data sets or data structures are called transaction sets.

[279] The meaning also is determined by the value of the element.

NIST gave short shrift to EDI as a possible standard for electronic archives, but it could become more interesting as its features converge with those of SGML. EDI standards development is moving toward accommodating document types of interest to federal agencies. Transaction Set 864 for text messages encompasses contracts.[281] Transaction Sets 848 (Materials Safety Data Sheet), and 841 (Product Data) move EDI away from strictly commercial purchase transactions to encompass a wider universe of structured documents. EDI may be well suited for administrative records.[282] It also may represent a framework for developing a better database standard, related to SQL.

EDI is essentially one dimensional, while SGML is more two dimensional.

8. SGML

Standard Generalized Markup Language ("SGML") is defined in FIPS Pub. 152. A generalized markup language defines styles such as "headline1," "headline2" and "bodytext" in a header, in terms of their typeface, point size and style. Then portions of text to be set as headline1 would be marked "headline1," body text would be marked "bodytext," and the typesetter or printer driver would perform the procedural steps to set the marked text according to the defined styles. Procedural knowledge is separated from the text, but no content is indicated directly by the markup codes. SGML is a standard way to specify the tags and procedural definitions. Both SGML and page description languages like Adobe's Postscript originated in connection with typesetting and desktop publishing.

SGML, like the other text standards considered by NIST, accommodate compound documents.

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[280] The example is greatly simplified from a real EDI standard.

[281] Transaction Set 864, however, does not permit contracts to be processed by a computer. Early efforts are underway to launch an electronic contract transaction set drafting effort within X12.

[282] *See* §IV(B)(1) for a the three suggested categories of agency information: decisional, administrative and technical.

ISO Standard 8879[283] notes the interaction of SGML with word processing features like WYSIWYG.[284] It implicitly distinguishes between SGML and an EDI transaction set by noting that the ISO standard does not identify or specify "standard" document types, document architectures, or text structures.[285] It does however, note that the efficiency of document formatting can be improved by the use of context from document descriptions: "element declarations."[286] At several points, the standard implicitly or explicitly suggests X12-like efforts to develop standard document type definitions, rather like EDI transaction sets.[287] The supporting documentation explicitly encourages X12-like efforts[288] to standardize document type definitions and other markup constructs.[289] It gives the "Blue Book" citation convention as a legal example of such a standard.[290]

The Association of American Publishers has adapted SGML for author manuscripts, electronic composition and for electronic publishing formats like CDROM. There has been some movement toward use of the AAP SGML standard, but it is hardly in universal use.

SGML is useful but it is not the only standards approach suited for the long run. SGML is not a part of OSI or GOSIP, although the Defense Department CALS[291] program mandates SGML for certain purposes. In order to be useful, SGML requires a parser to reconstruct the document, and it does not easily permit compound documents, although it does accommodate pointers. On the other hand SGML can represent anything, so it is inherently a flexible foundation for a collection of standards, including supplementary definitions of document types and presentational options.

SGML in the electronic archives context requires the following supplementary standards:

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[283] International Standard 8879 - Information processing - Text and office systems - Standard Generalized Markup Language (SGML) (1st ed. - 1986-10-15) (Rev. no. ISO 8879-1986(E)) [hereinafter "ISO Standard"].

[284] ISO Standard at 59 (word processing); *id.* at 100 (WYSIWYG).

[285] ISO Standard para 1(a) note (a).

[286] ISO Standard at 21 (para. 6); id. at 63.

[287] ISO Standard at 66 (para B.1.2); *id.* at 71 (B.4.2- allowable structures); *id.* at 74 (attributes and chart resembling transaction set illustrations).

[288] Document structures and entities are user-definable in SGML. ISO Standard at 11 (para 4.120).

[289] ISO Standard at 110.

[290] ISO Standard D.1.1(a).

[291] Computer Assisted Acquisition Logistics System.

1. A Document Type Definition ("DTD") for each document or record type.[292]
2. Document Style Semantics and Specification Language ("DSSSL.")[293] DSSSL supplies formatting or presentational information for an SGML document that already exists. It is equivalent to stylesheet definitions in sophisticated word processing programs like Microsoft Word. DSSSL is the link from SGML to SPDL.
3. SGML Document Interchange Format ("SDIF"). SDIF is used to interchange SGML text files. It specifies a data structure which allows an SGML marked-up document developed in separate parts to be packed into a data stream for interchange in a manner that permits the recipient to reconstitute the separate entities.[294]
4. Office Document Language ("ODL")[295] ODL specifies how SGML documents can be coded so they are equivalent to ODA documents. ODIF and ODL representations are technically equivalent, permitting a document to be transformed from one to the other without loss of information about the document constituents and attributes.[296]

SGML's application in the SEC EDGAR system illustrates the potential convergence between SGML, EDI and page description languages. SGML is used by EDGAR to indicate content, rather than style alone. Ultimately, it is reasonable to expect a convergence between SGML and potential EDI standards for text. These standards approaches may merge conceptually with a merger of formatting technologies for printed impressions and for database management and retrieval and may eventually include a merger between page description and hypertext.

9. ODA/ODIF

ODA/ODIF[297] is regarded by many knowledgeable students of standards as the most promising standards effort for federal electronic records.[298] It accommodates compound document characteristics. To date, most of the

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[292] Appendix C at 12.

[293] ISO-TECJTC1/SC18-WG8N606.

[294] ISO 9069-1987; Appendix C at 12.

[295] ISO 8613-5 (1988) (an SGML application; see attachment C at 13).

[296] *See* Appendix C at 20 (quoting ISO 8613-5).

[297] ISO 8613-1988. ODIF is a data stream used to transmit ODA-structured documents. Canadian ODA/ODIF Report at 26.

[298] *See* Canadian ODA/ODIF Report at Annex A (comparing SGML and ODA/ODIF).

ODA/ODIF development effort has been European and Canadian rather than American. ODA may be more machine dependent than SGML because it has format information in it. Parts 1-6 of the ODA/ODIF standard were approved in January 1988.[299] The current standard defines architectures for characters, bitmapped graphics images and object-oriented graphics images.[300] Future extensions are anticipated to encompass digitized sound, color and spreadsheets.[301]

ODA/ODIF permits exchange of documents in formatted form, permitting display of an image, but not further processing, or in processible form.[302] ODA provides two complementary descriptions of a document: a logical structure, composed of hierarchically arranged content elements like sections and paragraphs; and a layout structure, composed of presentation elements like pages and columns.[303] A document profile accompanying an ODA document specifies character sets, styles, and presentation device requirements.

The ODA/ODIF standard assumes an abstract document processing model that encompasses the major stages of adding value introduced in §IV(B)(2) of this report.[304]

The National Archives of Canada is sponsoring pilot projects with ODA/ODIF in an agency environment.[305] A report commissioned by the Canadian archives concluded that most major software vendors have expressed their intention to support ODA/ODIF, although no commercial products exist yet.[306]

The NIST OSI implementors' workshop has established an ODA special interest group to develop pilot ODA profiles.[307]

10. SPDL

Standard Page Description Language ("SPDL")[308] is a page description language, functionally like Adobe Postscript. SPDL is not revisable, which has some advantages for archival documents. The NIST report suggests that

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[299] Canadian ODA/ODIF Report at 17.

[300] Canadian ODA/ODIF Report at 24.

[301] Canadian ODA/ODIF Report at 24.

[302] Canadian ODA/ODIF Report at 17.

[303] Canadian ODA/ODIF Report at 20.

[304] *See* Canadian ODA/ODIF Report at 29 (discussing and distinguishing editing process, document layout process, document imaging process).

[305] *See generally* Canadian ODA/ODIF Report.

[306] Canadian ODA/ODIF Report at 5-6.

[307] Canadian ODA/ODIF Report at Appendix C, page 10 (discussing conformance testing).

[308] ISOJTC1/SC18/WG8N561 (third working draft February 19, 1988).

NARA maintain documents in SPDL format while the agencies may wish to keep them in ODA/ODIF format so that they can be revised and portions reused.

11. Applications Portability

Most of the standards introduced in this section relate to portability of files among hardware platforms and operating systems. It also is important that applications software be portable. A report prepared for the National Archives of Canada[309] identified the following properties for application portability across different hardware and operating systems:

- -- Consistent user interface, permitting a user trained on any one platform to use any other platform and use the application without additional training.
- -- Same set of functions and facilities on all systems.
- -- Exchange of data generated on one system to or from another system, including alphanumeric data or more complex structures such as documents, spreadsheets, and graphical images.

The report identified POSIX,[310] the NIST Application Portability Profile,[311] and the X/open activity, the Open Software Foundation, IBM's SAA and X/Windows as approaches that could result in application portability.

The APP architecture divides the operating environment in which an application resides into six functional components: operating system, database management, data interchange, network services, user interface, and programming services. The APP defines a set of standard elements for each component using nonproprietary standards.[312]

12. Uses of standards by agencies and the National Archives

The NIST report suggests that documents be marked with SGML tags, their format described using DSSL, and then translated to SPDL for storage and retrieval. ODA/ODIF documents also could be translated to SPDL for storage and retrieval. ODA structured documents would be represented for interchange by ODIF, while ODA structured SGML documents could be represented for interchange by ODL, permitting documents to be converted from one to the other without loss of information about the document constituents and attributes.[313]

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[309] Protocol Standards and Communication, Inc., 1757 Bank Street, Ottawa, Ontario K1V7Z4, Application Portability (FE6 1989 PSC-ARZ003-1).

[310] *See also* FIPS Pub. 151-1, 55 Fed.Reg. 11424 (March 28, 1990) (adopting POSIX standard).

[311] *See also* Proposed Federal Information Processing Standard (FIPS) for the User Interface Component of the Applications Portability Profile, 54 Fed.Reg. 24372 (June 7, 1989).

[312] Canadian 1989 Status Report at 2.

An important limitation of some of the standards candidates is that documents following them are not revisable. Nonrevisability may be a virtue for the basic archives document, but assuming that archives users get their own copies of archives documents, they very well may want to be able to revise them, if only to incorporate portions of them into other documents.

Standards by themselves do not resolve important electronic records management issues. For example, ODA/ODIF cannot be applied as an archival transfer standard unless retention and disposition of electronic documents is managed effectively among various users of a LAN. A data interchange format such as ISO 8211 cannot be effective if data are poorly documented or cared for.[314]

An important use issue is whether an archives organization should provide conversion services or otherwise assist in converting data to formats maintained by an archives organization to formats desired by users. This is of course the same issue as FOIA electronic formats questions.

While the National Archives is correct not to rush to a standard that has not been tested and for which software is not available, it may not be appropriate for the National Archives to wait until comprehensive records management procedures are put in place. As other parts of this report note, appropriate records management procedures require reforming organization structures and cultures. This is a process that is difficult in the best of circumstances and probably never can be achieved perfectly. While shortcomings will continue to exist in records management procedures, agencies continue to turn out large amounts of information, more and more of it in electronic form. The National Archives must develop an interim strategy to preserve and to accessions this mass of electronic data while it works to improve the organizational environment within which the information is generated and recorded in the first place.

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[313] *See* NIST Report Appendix C at 20 (quoting ISO 8613-5). ODIF is defined in 8613-5 as is ODL.

[314] *See* McDonald 1987 Archivist Paper at 7.

V. Institutional Arrangements

A. Individual Agency Responsibility and Archivist Authority

The most difficult problem in implementing any electronic records management policy is that records management responsibility is dispersed throughout government agencies. The increasing adoption of microcomputer systems increases this dispersal. There are no technical impediments to the design of standalone PC-based systems to meet records management needs, and to enhance records management on such systems by making it transparent to users. But every standalone PC user is the ultimate records manager for the files on her PC, and education is even more necessary than when fewer decisionmakers control time sharing host computers or network file servers.

Corporate culture affects the feasibility of implementing records management decisions. For example, an organization like NIH has a corporate culture involving very defuse control by central authority.

It is important for everyone to realize that the main problem in effective records management and archives enhancement is not too little information but too much information. The more an agency or an archives entity keeps, the less likely are users to be able to find what they need. The major challenge is in defining classes of records that should be destroyed in sufficient quantity, not increasing the already excessive legal tendency to encourage people to keep everything forever.

NARA has an inspection program, which is reviewing agency practices at the rate of two to three agencies a year, potentially providing encouragement to senior agency officials possibly reinforced by the Congress or OMB to meet records management responsibilities.

NARA's reluctance to play a stronger enforcement role is motivated by an unwillingness to jump into the middle of politically sensitive issues that high level government officials care a lot about, and the practical unenforceability of over-ambitious and over-mandatory requirements that are not "owned" by responsible agencies in which opposed burdens without meeting immediate agency needs for information.

Most agencies do not defy NARA explicitly, but sometimes they make promises they do not keep. Some agencies are, however, forceful in refusing to transfer records to the national archives, frequently when they have a strong sense of their own institutional history and constituencies that want direct access to archival documents.

In many respects, the states are ahead of the federal government in taking a leadership role on solving the problems and recognizing the potential of electronic technologies for records management. Leadership at the national level would be enhanced if NARA continues its recent inclination to develop concepts and propose solutions.

B. Judicial Role

The *Armstrong* case raises institutional responsibility issues that must be confronted in any legal assessment of electronic records retention. First, what is the nature of the injury under the records statutes, the Freedom of Information Act, and the Administrative Procedure Act when electronic records are destroyed? This injury assessment determines whether standing exists. Second, what is the appropriate standard for judicial review, assuming standing exists? The answer to this question determines the scope of discovery and of any trial of a dispute over electronic records management. Does a court examine the merits of retaining documents, or only review the procedure used by the agency in classifying electronic documents? Procedural review may involve review of computer programs that perform the classification functions.

C. Long Term Federal Government Arrangements

The existence of agency archival records in electronic form, the availability of easily copiable electronic storage media, and potential accessibility via telecommunications links suggest eventual national archives systems that blur traditional institutional boundary lines.

For example, duplication of an optical disk containing archival information at the request of an archives user implicates printing functions historically within the jurisdiction of the Government Printing Office.[315] Maintenance of agency records already overlaps jurisdiction of NARA and GSA. Collecting information for a research use historically was within the jurisdiction of the Library of Congress as well as the NARA. The Library of Congress has an extensive pilot program underway to develop experience with machine readable formats.[316] To the extent that telecommunications links and new storage media facilitate distributed maintenance of archival information, and remote retrieval of such information, the depository library system or something performing the same function has an obvious role to play. Some of these agencies have not been very effective in playing a leadership role with respect to electronic information. NARA, GPO, and the Library Community are examples. The Library Community has been particularly parochial and unhelpful in formulating solutions as opposed to protecting its traditional turf and existing institutional arrangements.

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[315] Duplication of records, and single copies on demand, is not, of course, the same thing as mass production printing functions traditionally associated with the Government Printing Office. NARA has made paper and microfilm copies of records for many years. 44 U.S.C. §2307 gives the National Archives Trust Fund Board special authority to duplicate records and print publications.

The are some conflicts among new roles. NTIS wants to charge for its electronic information. If it gives the information to NARA, NARA effectively gives it away, undermining the NTIS pricing structure. The same negative inducement for transferring information to NARA exists with government contractors.

Depositing electronic information with NTIS is not the same as depositing it with the National Archives. The National Archives serves audiences who may not be influential in resource allocation decisions by agencies, by NTIS, or by GPO or the Library of Congress.

The National Archives only recently was removed from the General Services Administration, and it is not constructive to suggest revisiting old organizational arrangements. Nevertheless, it is not inappropriate to think about long term functional realignments. Eventually, it may be appropriate to define a single agency to manage physical storage, including particularly the computer systems on which a growing proportion of agency archival records would be maintained. This agency also would manage telecommunication links integrated appropriately with new high speed research communication systems and the new federal government telephone system. New organizational arrangements may be appropriate for duplicating archival media, and for facilitating user access to archival information. In concept, this would be more efficient than having several different agencies performing all of these functions. The disadvantage would be less flexibility to respond to differing needs of agencies and the communities that use information generated by them.

One must be careful, however, to preserve a locus of archivist expertise and sensitivity to historical uses of information The orientation of the library and archivist professions may be different in important respects. For example, members of the archivist profession say that the library community historically has had little interest in the provenance of information,[317] which archivists understand and support. Some archivists believe that provenance related information issues will become increasingly important for electronic records. For example, knowing the origin or source of particular information may be particularly important in authenticating information for legal purposes. It also may be important to preserve intellectual property rights. As noted previously, agency information cannot be practically accessible without some significant effort to link the organization of the information to the organization and mission of the agency when it was created. This linkage and this providing of context is an archivist specialty.

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[316] *See* generally Permanent Papers at 102.

[317] Provenance refers to the origin or source of information.

On some occasions at least, NARA has not evidenced in aggressive attitude in getting ready for an electronic records environment. For example, in answers to questions submitted by Representative Weiss, NARA appeared to take the position that paper formats will be adequate for 5 to 10 years and that something surely would come along to deal with the proprietary formats problem, even while acknowledging that Lotus 123 files cannot be interpreted completely without reference to the software used to create the files.[318]

A passive NARA is not desirable. At the very least, NARA should seek out opportunities to do pilot and demonstration projects with standards possibilities for text and database information. For example, DOD's CALS organization almost certainly would be willing to participate in an SGML pilot. The SEC's EDGAR project probably also would be willing to participate in an SGML project. The Federal Maritime Commission probably would be willing to participate in proving database standards, possibly including SQL.

Standards is not a technical question; it is a policy question. Deciding how standards will be set and what they should be involves allocating responsibility between public and private sectors and among public sector agencies.

D. Public Private Sector Responsibilities

No strong private sector interest in records management is apparent yet, except by private sector companies hoping for contract opportunities to develop and manage records management systems. Two different kinds of markets are conceivable for electronic records activities. The first is a market represented by the federal government as a purchaser of hardware, software, and services. This market likely will evolve around new standards, and copying and refreshing activities. A second market is a potential market for archived information in electronic form.[319]

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[318] *See* Permanent Papers Hearings at 44.

NARA identified genealogy as a potential market, and already has sought to serve it directly, with most demand experienced for paper records. Another possibility is climate meteorological information represented by NOAA's 13,000 tapes of satellite information. Nevertheless, no private sector interest has been expressed in market opportunities associated with these data. The ODISS Project involving the state of Tennessee conversion of Civil War records to optical disk formats, while resulting in useful information applicable to other similar projects, confirmed expectations that the records involved were not subject to large public demand.

Eventually, as direct electronic access to government information of all kinds becomes more widely available, private sector opportunities may be more obvious in connection with electronic access to archive information. Indeed FOIA and archives type adhoc access will become less distinguishable from electronic publishing with its inherently greater market.

VI. Recommendations for Consideration by ACUS

Recommendation 1(a) parallels Part A of Recommendation 88-10. It starts with the premise that the basic policy balances have already been struck and does not seek to reopen them. Existing policy reflected in the records statutes[320] and in National Archives and Records Administration (NARA) regulations and guidelines should be applied to the new electronic formats, with the objective that changing from paper to electronic media should not diminish the historical record of the government or its accessibility. There are some instances in which a rule designed for paper information, when applied to electronic information, may produce significant differences in result.

In other instances, electronic formats present entirely new issues for records management, as with relational databases,[321] whose content is constantly changing, and whose use is different in character from traditional documents. In these instances, NARA and other agencies should identify explicitly the records management and records preservation issues presented and seek to resolve them in accordance with the basic purposes of a government-wide records management and archives system. The recommendation is not intended to discourage agencies from taking advantage of an enhanced ability to preserve additional records that may result from technological change.

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[319] NARA notes that it is in the nature of archives that they are used only infrequently, and therefore present only a very limited market, usually not justifying private investment.

[320] *See*, for example, The Federal Records Act and related statutes in 44 U.S.C. Chaps. 21, 22, 29, 31, 33 (1988).

[321] A"relational database" is composed of separate tables from which data are extracted and presented to a user as though they came from one database. A relational database is sometimes also a "distributed" database, meaning that it is made up of tables physically located at different places on a network.

OMB, NARA, and GSA should approve a records management appendix to OMB circular A-130, such as that drafted by NARA. NARA should develop guidelines for federal agency use in implementing the Federal Information Resources Management Regulation (FIRMR) requirement that records management concerns be addressed in the system design of new agency information systems. NARA recognizes the need for this.[322]

NARA should continue and intensify its education efforts to train agency policy level personnel and working level clerical and word processing personnel on how to design records managements systems and how to meet responsibilities under the records statutes.[323]

Recommendation 1(a) also states that the substantive legal rules and the boundaries of judicial review should not be changed by shifts toward electronic formats. This means that the evolution of rules concerning standing to enforce the requirements, and of the relationship between the Freedom of Information Act and the records statutes should continue, and that agency treatment of records in electronic formats should be subject to the same scrutiny as is applied to records in paper formats having the same content. In sum, the guiding principle should be that the content of the record, and not the format of its storage, should control the rules governing its retention and accessibility.

Recommendations 1(b) and 1(c) extend the basic principle of Recommendation 1(a) to public access. Electronic information formats have the potential to permit enhanced public access even as the volume of information grows, because of the potential for better indexes that are computer searchable and the possibility of free-text search. However, a great threat to longterm public access to electronic information formats is technological obsolescence, the possibility that, by the time someone wants to read information from a magnetic or optical disk, computer hardware and software capable of reading the information will not be available. This threat must be avoided--not by refusing to accept electronic information formats, but by working to develop and adopt standards for information exchange. Such standards must also accommodate newer more sophisticated document and database structures such as hypertext--or other compound documents composed of graphical, audio, and video, as well as textual components--and relational distributed databases.[324] Otherwise, solutions to technological obsolescence will themselves become obsolete as agencies adopt future technologies.

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[322] Technical Information Paper No. 8 at 20.

[323] Existing and not-yet-released NARA educational materials are a very good start in this direction. The GSA pamphlet also is a useful model.

Recommendation 1(d) urges that records managers and archivists avoid archival practices that impair the use of electronic information technology in carrying out the agencies' programmatic activities. For example, it might not necessarily serve the public interest to prohibit standalone microcomputers on the grounds that records management functions can be accomplished with greater effectiveness on time sharing or other network systems. NARA should begin to accept optical media, even though nonproprietary format standards are not adequately defined. NARA should develop interim procedures for recopying and thus preserving the information contained on optical media as format standards evolve. The high density of optical media and the utility of such media for small computers would considerably reduce the costs of agency records management and improve the implementation of records management guidelines.

Recommendation 1(e) encourages agencies to coordinate their use and development of electronic record-keeping technology and standards with the private sector to the fullest extent possible.

Recommendation 2 recognizes the need to give agency managers and counsel guidance as to the admissibility of electronic records as evidence in various proceedings. Without such guidance, agencies may be reluctant to eliminate redundant paper versions of electronic records.

Recommendation 3 addresses problems relating to preservation of the records of agencies and commissions that are established on a temporary basis.

Recommendation 4 urges that NARA take a more active role in showing agencies how to harmonize records preservation objectives with agency modernization, and in exploring standards that can mitigate potential problems of incompatibility and technological obsolescence. While NARA's reluctance to adopt document transfer or database transfer standards that do not have an established commercial base is appropriate, NARA should also take the initiative in promoting the development of appropriate standards through private standard-setting organizations,[325] and should encourage agencies to make use of available commercial products embracing the most promising standards.

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[324] Arelational database is composed of separate tables from which data are extracted and presented to a user as though they came from one database. A distributed database is made up of tables physically located at different places on a network.

[325] *See*ACUS Recommendation 78-4, Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1 CFR §305.78-4.

While NARA's reluctance to adopt document transfer or database transfer standards that do not have an established commercial base is appropriate,[326] NARA should also take the initiative in promoting the development of appropriate standards through private standard setting organizations,[327] and should encourage agencies to make use of commercial products embracing the most promising standards.[328] NARA should evaluate an SGML-based standard for textual information, working with NIST and commercial software vendors.[329] NARA should develop standard document type definitions and other markup constructs. NARA should act on its expressed intent[330] to participate in the development of CALS to address the use of the SGML standard and its implications for broader electronic records management and standards for text and database management. The Defense Department should welcome this participation. In conjunction with its participation in the CALS initiative, NARA should define preliminarily the circumstances under which agency electronic documents should be transferred in a page image that cannot be altered easily, as under the SPDL standard, and the circumstances under which it would be acceptable or preferable to transfer the content of an agency electronic document so that archives users could edit the content further upon obtaining an electronic copy.[331]

NARA should develop new paradigms for databases, determining the relevant information for historical purposes, considering as possibilities the state of the database against which queries were executed, the queries themselves, or periodic "snapshots" of major databases. NARA should develop new paradigms for compound documents, determining how such documents can be archived, beginning with concepts developed for databases. NARA should develop concepts for archiving textual documents published on demand, including guidelines as to which version should be archived. NARA should work with agencies to develop free text algorithms to select documents as candidates for retention, to eliminate the need for human intervention to code documents. The ultimate goal should be making records management transparent to agency employees.

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[326] *See* National Archives, A National Archive Strategy for the Development and Implementation of Standards for the Creation, Transfer, Access, and Long-term Storage of Electronic Records of the Federal Government (National Archives Technical Information Paper No. 8 June 1990) [hereinafter "Technical Information Paper No. 8"].

[327] *See* Technical Information Paper No. 8 at 17-19.

[328] National Technical Information Paper No. 8 at 8-9 (describing NARA posture on the relatively immature standards for document and database transfer).

[329] *See generally* 55 Fed.Reg. 11424, ___ (NIST release on POSIX, discussing FIPS Pub. 152 standard for SGML).

[330] *See* Technical Information Paper No. 8 at 16 (describing intention to assist in the development of CALS).

[331] *See* Technical Information Paper No. 8 at 814.

NARA should encourage agencies to obtain, and ensure that its center for electronic records obtains, experience with IRDS products as they become available.[332] In the meantime, NARA should announce its willingness to accept SQL formats for databases to be transferred.[333] Ultimately NARA should select a standard database to use for retrieval, and should update media and technologies used to maintain the electronic database instructions more frequently than the content of the database transferred. NARA should maintain in electronic form the necessary descriptive and indexing information. NARA should undertake a data administration function using data dictionary techniques.[334] Until a NARA database standard is developed and implemented, databases should be transferred in flat file form, with accompanying electronic documentation of the database schema. NARA should act on its expressed intent[335] to participate actively in a dialogue with records management professionals, standard setting organizations, and software and hardware developers to intensify development of standards for document and database transfer and automated records management.

RECOMMENDATIONS

1. Federal agencies, including those responsible for archival and records policy, should ensure that:

(a) changes in the technology of recordkeeping, including the transfer of records from paper to electronic formats, do not (i) affect the content of information that is retained for eventual transfer to the National Archives, (ii) alter the availability of, or criteria for, judicial review of agency compliance with records law, or (iii) otherwise alter the substance of records law;

(b) changes in the format of agency information from paper to existing and future electronic media do not reduce the accessibility of information to the public;

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[332] Accord Technical Information Paper No. 8 at 12-13.

[333] *See* Dept. of Commerce, National Institute of Standards and Technology, Approval of Federal Information Processing Standards Publication 127-1, Database Language SQL, 55 Fed.Reg. 3627 (Feb. 2, 1990).

[334] *See* NIST Report §3.2.2.1 at 20.

[335] *See* Technical Information Paper No. 8 at 22.

(c) accessibility is not degraded by technological obsolescence of electronic formats;

(d) policies and procedures aimed at enhancing records management should complement and, in any event, not impair the utility of information systems for the performance of agency missions; and

(e) maximum use is made of generally available technology and, whenever feasible, that agencies conform to standards that are widely agreed to and in use in the private sector.

2. The Office of Management and Budget and the Department of Justice should promulgate guidance to agencies and, as necessary, proposals for statutory changes on questions relating to admissibility of electronic records as evidence and other reliability issues.[336]

3. Temporary agencies and commissions should, in consultation with NARA, manage their recordkeeping (consistent with the agency's mission) in such a way as to ease the transfer and preservation of their records upon the agency's dissolution.

4. The National Archives and Records Administration should seek out opportunities for pilot and demonstration projects, covering candidates for standards for text and database information that can ensure the transferability of such information from agencies to NARA and ensure longterm accessibility to the public. NARA and the White House Office of Administration should develop concepts for a turnkey Presidential records system that could go to a presidential library along with electronic presidential records, providing immediate public access to records to which access is permissible.

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[336] Legalissues relating to reliability include signature requirements and contract documentation. *See*, for example, the federal statutory counterpart to the Statue of Frauds, 31 U.S.C. §1501.

VII. APPENDIX: OTHER STUDIES AND REPORTS

A. Interagency Committee on IRAM

In 1986 and 1987 a special task group on electronic recordkeeping of the Interagency Committee on Information Resources Management conducted five case studies of agency electronic recordkeeping. The case studies focused on systems serving program functions that also contain rules or procedures for indexing, storing, retrieving, and disposing of information. Simple electronic mail systems were excluded. The task group examined:

-- the Forest Service information processing system
-- the Federal Trade Commission's legal research system
-- the EPA's Superfund system
-- the Social Security Administration claims modernization project
-- the Air Force Communications Command.

The 1987 Forest Service system was a Data General distributed network involving Data General Eclipse series MB400 and MB8000 minicomputers located in each of about 900 Forest Services offices around the country, supporting about 10,000 workstations serving about 30,000 agency employees. The system included formal and informal correspondence, office automation activities such as electronic record filing, electronic mail, and calendars and most administrative recordkeeping. Formal communication subsystems forced personnel to follow the agency chain of command. The electronic system documented clearances and concurrences, but paper was used as the medium for the official archival record, generated at the time a document was officially signed. No procedures existed for retaining draft documents, and since official records were maintained on paper, retention/disposition scheduling, reports and forms management was not integrated into the automated system.

The Federal Trade Commission Legal Research System ("LRS") indexed and summarized legal, economic, and procedural documents used by the Commission, including correspondence, memoranda, reports and speeches, some of which were prepared outside the agency. The FTC did not consider the contents of the LRS to be Federal Records Act records.

EPA used a manual recordkeeping system, converting any electronic records into paper form.

The Social Security System was aimed at automating the processing of initial retirement and survivors insurance claims, beginning with the 20 most used forms. Initial claims applications and supporting documentation were created on line via buffer mainframes at six program service centers strategically located around the country. Electronic records were maintained on line for 120 days and then copied onto magnetic tape for indefinite in house retention. Tape records were retrievable within 24 hours. Although there were no "drafts," changes to initial data entry were noted by date, change and individual making the modification. This practice created an audit trail. Records retention policies were somewhat vague.

The Air Force system was a pilot program using off-the-shelf McDonnell-Douglas developed "Augment" software providing electronic mail, document production and control, and personnel information management. Comprehensive document identification was required for each new document, including office symbols, subject, author, suspense date, comments, key words, disposition code, and special instructions. Records were created on hard disk and transferred to magnetic tape if the records were not accessed after 120 days. Documents accessed during the 120 days on line were kept on line for another 120 days. There was no default destruction feature. A NARA-approved interim disposition schedule consisted of five items encompassing the entire universe of documents.[337]

The study group concluded that:

-- "Record keeping rules and procedures should be built into major electronic information systems from the outset.

-- "This means that agencies must involve records managers in the design as well as implementation of electronic information systems."

-- "Records management considerations have direct consequences for system hardware and software; among other things they affect system memory requirements, online response capabilities, magnetic tape costs and storage, space management, and the entire system environment."

-- "Records management design and implementation should entail procedures for auditing information processed by the system, or designating responsibilities for ensuring that records management procedures are followed, and periodic review for adopted records management practices."

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[337] The study group thought the Air Force disposition schedule warranted consideration by other agencies. The schedule provides for:

temporary,a retention period of two years

middle,retention period of two years

middle,retention period of eight years

long,a retention period of twenty years,

indefinite,disposition based on appending event or action, and

permanent,records offered to NARA.

- "IAC/IRM[338] should request GSA,[339] in connection with the Department of Justice, to supply guidance and develop standards regarding the legal admissibility of electronic records."
- "Agencies have insufficient awareness and knowledge of NARA's role in records management and overall information management benefits to be gained from good records management practices. This is a problem for OMB and GSA as well as NARA."
- "The study group suggested that central management agencies might profitably develop a records management appendix to OMB circular number A-130,[340] to accompany relevant portions of the FIRMR[341] and NARA regulations."

B. National Academy of Public Administration

A 1989 report by the National Academy of Public Administration ("NAPA Report")[342] is a comprehensive and thoughtful discussion of the interaction between electronic technologies and the historical record of the government. The report notes that new computer technologies have potentially great impact on the organization of governmental work[343] but that agencies use the technologies with varying intensity.[344] While increasing use of the technologies creates increased risks of data loss,[345] it also presents the following possibilities:

- more sophisticated electronic document forms,[346]

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[338] Inter Agency Committee on Information Resources Management.

[339] General Services Administration.

[340] Circular A-130 deals with management of federal information resources.

[341] Federal Information Resources Management Regulation. *See e.g.*, 41 CFR §201.30.007 (1988) (life cycle design).

[342] National Academy of Public Administration, The Effects of Electronic Recordkeeping on the Historical Record of the United States Government, A Report for the National Archives and Records Administration (Jan. 1989) (hereinafter "NAPA Report.")

[343] NAPA Report at 28.

[344] NAPA Report at 25-26.

[345] NAPA Report at 38.

[346] NAPA Report at 32.

-- "live," instead of "dead" archives,[347]
-- new tools for indexing, storage and retrieval of records,[348] especially if those features and other record management goals are designed for at the beginning of electronic information system design,[349] and
-- a way of dealing with the mountains of paper that represent the real crisis in records management and preservation.[350]

The electronic technologies do not change certain problems of records management:

-- the failure of information system designers to talk to records managers or to take records management into account in designing practical work systems;[351]
-- the difficulty of defining the concepts of "record" and "lasting value" in the abstract so that variations in application can be minimized;[352] and
-- the fact that the real enemy of public access to government records is the quantity of unorganized information, as much as loss or destruction of the information.[353]

The report's recommendations include attention to the need for format standards to facilitate records transfer among organizations, for example between agencies and NARA, or between NARA and citizens, and among technologies,[354] and the need for law reform, including mainly the need for additional authority in the Archivist, and less discretion for agencies.[355]

C. 1988 NARA Task Force

In 1988 a task force[356] commissioned by the Acting Archivist reported.[357] The task force concluded that the Archivist of the United States should be given additional authority to issue binding regulations interpreting[358] the existing statutory definition[359] of records. It considered the possibility of amending the FOIA to incorporate the definition of records developed by the Archivist, in order to reduce the tendency of confusion over the FOIA definition of records to interfere with agency records creation and management practices.[360] It recommended legislation emphasizing the need for adequate documentation of the process of decision and policy making,[361] and requiring agencies to promulgate record keeping and disposition requirements in accordance with NARA standards.[362]

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[347] NAPA Report support for recommendation 4 (discussing "active collections.")

[348] NAPA Report at 45.

[349] NAPA Report at recommendation 6.

[350] NAPA Report at 43.

[351] NAPA Report at 36; recommendation 6.

[352] NAPA Report at 41.

[353] NAPA Report at 42.

[354] NAPA Report Recommendation 6.

[355] NAPA Report, Recommendation 10.

[356] Hereinafter "NARA Report." This effort also is known informally as the "CAPA Report."

The NARA report generally suggests greater oversight by NARA[363] and by agency officials, possibly agency inspectors general. It urged, however, that primary responsibility for creating and maintaining records must remain with agency heads because records creation and maintenance is intrinsic to the administration and functioning of any institution or program.[364] It recommended avoidance of new authority that would compel the Archivist to decide on a case-by-case basis whether something qualifies as a record,[365] rejecting giving the Archivist standing to sue, but taking no position on whether the Archivist should become a special master to courts hearing records controversies.[366] It urged legislation to increase the Archivist's authority to inspect and eventually to "accession" records whose access may be restricted by statute, to limit the effect of *American Friends Service Committee v. Webster*.[367]

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[357] NARA, NARA and Federal Records: Laws and Authorities and Their Implementation: A Report of the Task Force on NARA Responsibilities for Federal Records and Related Documentation (Feb. 1988) (hereinafter "NARA Report.")

[358] NARA Report at 2 (II(B)); id. at 15 (suggesting language).

[359] NARA Report I(B)).

[360] NARA Report at 17 (suggesting amendment language).

[361] NARA Report at 4 (IV(B)(5).

[362] NARA Report at 15 (suggesting language).

[363] NARA Report at 12, *citing* 44 U.S.C. §§2904(c)(7) and 2906(a)(1) (authorizing Archivist inspections and surveys)).

[364] NARA Report at 14.

[365] NARA Report at III(B)).

[366] NARA Report at 19.

[367] 720 F.2d 29 (D.C.Cir. 1983) (affirming district court order compelling development of adequate records disposal plan and enjoining destruction of records until plan developed; finding standing and reviewability). See NARA Report at 20 (suggested language). The *American Friends* case is discussed in §II(D)(2) of this report.

The NARA Report's guidelines cover not only archival records, but all documentary materials. They propose that agencies systematically maintain documents containing data having informational value[368] or that:

- facilitate action by agency officials and their successors;[369]
- make possible scrutiny by Congress and other institutions "and other persons properly and directly concerned" about the manner in which public business has been discharged;[370]
- protect financial, legal and other rights of the Government and of persons affected by governmental actions;[371]
- contain essential information on formulation and execution of basic policies and decisions or on major actions;[372]
- document significant decisions reached orally face-to-face, by telephone, or in conference;[373]
- document important board, committee or staff meetings, or matters considered at or resulting from such meetings.[374]

The guidelines generally are supported by NARA's "documentation standards."[375]

Authority for the guidelines is provided by 44 U.S.C. §§2104(a), 2904(a) and 2904(c).[376]

D. United Nations

In 1990, the United Nations Advisory Committee for the Co-ordination of Information Systems ("ACCIS") released a report entitled, "Management of Electronic Records: Issues and Guidelines."[377] The report resulted from the work of a technical panel established in 1987 and chaired by Richard Berry, Chief of the Information Services Division of the World Bank. The report surveys electronic records management within the United Nations system and concludes that all United Nations organizations are "in the midst of significant growth in the use of both electronic records and electronic communication systems; but most are unprepared to cope with them."[378] It identified policy level issues and sets of practical tools for arriving at policy solutions, and reported on emerging technology standards for facilitating information exchange and retrieval.

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[368] NARA Report at A-5.

[369] NARA Report at A-5, citing 36 CFR §1222.20(a)).

[370] NARA Report at A-5, citing 36 CFR §1222.20(a)). The scrutiny guideline is worded so as to support an inference that scrutiny by the general public is not a consideration.

[371] NARA Report at A-5, citing 36 CFR §1222.20(a)).

[372] NARA Report at A-5, citing 36 CFR §1222.20(b) (emphasizing importance of working papers).

[373] NARA Report at A-5, citing 36 CFR §1222.20(b)).

[374] NARA Report at A-5, citing 36 CFR §1222.20(b)).

[375] 36 CFR §1222 0.

[376] NARA Report at 12.

[377] *Hereinafter* "UN Report."

It suggested the need for policy guidance on the following issues, among others:

-- how should the concepts of record and nonrecord information be defined so that people and systems can implement the concepts?
-- what criteria for retention will lead to acceptable results for electronic records, while being consistent with criteria for paper records?
-- how can timely disposition of records be assured?
-- how can legality of electronic records be assured?
-- what organizational units should be involved in managing electronic records, with what specific responsibilities?
-- who should have physical custody of archival electronic records?
-- how can the format of records be prevented from being a barrier to access?
-- how can intellectual control and documentation be assured?
-- how can accessibility and security needs be balanced?

The report concluded with recommendations for specific steps, and for adoption by the UN of the OSI standard, along with its components ASN.1, ODA/ODIF and FTAM.[379]

E. Information Locator Report

In mid-1990, the GSA Regulatory Information Service Center and OMB's Office of Information and Regulatory Affairs released a report prepared for both agencies on the possibilities for electronic federal information inventory and locator systems.[380] The report recommended that OMB formulate policy initiatives for review and discussion, conducting additional research and developing a long range plan for the development of a government wide inventory and locator system. It recommended building consensus among the stakeholders interested in an inventory and locator system and avoiding the temptation to design a system outside the context of stakeholder views and without additional research.[381]

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[378] UN Report at ix.

[379] These standards are discussed in §IV(L).

[380] *See* C.McClure, Ann Bishop, Philip Doty, and Pierrette Bergeron, Federal Information Inventory/Locator Systems: From Burden to Benefit (July 27, 1990).

F. NAPA/NARA Database Project

The National Academy of Public Administration, under contract with NARA, has undertaken to review electronic database management practices by federal agencies, with a view toward developing recommendations for appropriate records management and archives practices for such electronic information storage, retrieval and communication techniques. The project report should be available in 1991. The author of this report is a member of the NAPA panel overseeing the project.

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[381] *See* McClure et al. at 89.

Report for Recommendation 90-6

The Use of Settlement Judges and Simplified Proceedings in Enforcement Actions Before the Occupational Safety & Health Review Commission

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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I. Introduction

"[W]e have only begun to identify the kinds of disputes likely to be amenable to the techniques of ADR."[1]

Although the impetus for "alternative dispute resolution" (ADR) originated largely in efforts to correct shortcomings in the judicial system,[2] the extension of ADR concepts to federal agencies has been both natural and inevitable. In some respects, federal agencies offer an even more fertile field for ADR than do the courts. If nothing else, agency formal adjudications[3] far outnumber the caseload of the federal courts.[4] Moreover, countless federal agency actions involve informal decisionmaking which is not preceded by any form of evidentiary hearing, but which may result in litigation before an adminstrative tribunal or judicial review by a federal court.[5] There is also constant and pervasive agency rulemaking, which produces volumes of regulations having the force and effect of law. As recognized by the Administrative Conference of the United States (ACUS), "there are a myriad of government activities," and "the best [ADR] procedure for a program, or even an individual dispute, must grow out of its own needs."[6]

During the 1980's, a number of federal agencies experimented with ADR techniques and devices. One of the most promising areas has been the field of government contracting,[7] where models and traditions drawn from resolution of commercial disputes abound. Less obvious, but likewise promising, there have been significant steps in extending ADR to rulemaking. Recent rulemaking proceedings for some eighteen federal rules reportedly have involved negotiation, in one way or another.[8] Initiatives and possibilities in other federal agencies have been described by the growing literature on ADR in administrative agencies.[9] Perhaps most significantly, there is serious Congressional interest in legislation to promote and encourage the use of ADR by agencies.[10]

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[1] J.K. Lieberman & J.F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

[2] *See*, Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A.J. 66 (June 1989); Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L. J. 125, 126 (1987); Sander, *The Variety of Dispute Resolution*, 70 F.R.D. 111 (1976).

[3] The word "formal" is used to signify adjudications involving the right to a full evidentiary hearing, such as those proceedings governed by 5 U.S.C. §§554, 556, and 557 (1988) (federal Administrative Procedure Act).

[4] *See, e.g.*, Schwartz, ADMINISTRATIVE LAW: A CASEBOOK 43, 45-46 (3d.ed. 1988).

[5] *See*, 1 Davis, ADMINISTRATIVE LAW TREATISE §1:4 (K.C. Davis 1978).

[6] ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1990).

[7] Crowell and Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation* (Report to the Administrative Conference of the United States) (January 1988).

The subject of this Report is the use of Settlement Judges[11] and Simplified Proceedings[12] in adjudications by the Occupational Safety and Health Review Commission (hereinafter, OSHRC), which has been something of a pioneer among federal agencies in implementing ADR. After describing generally the Settlement Judge and Simplified Proceedings concepts, and their relation to other forms of ADR, this Report will: (1) give an overview of the statutory system and context in which these ADR devices operate, namely the adjudicatory system created by the Occupational Safety and Health Act;[13] (2) discuss some important differences and similarities between this system and the situation in other agencies using ADR techniques; (3) examine in detail how Settlement Judges and Simplfied Proceedings have been operating in actual practice; and (4) offer conclusions and recommendations.

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[8] Cameron, Harter, Bingham, & Eisner, *Alternative Dispute Resolution with Emphasis on Rulemaking Negotiations*, 4 ADMIN. L. J. 83, 96-97 (1990) (Colloquium, Proceedings of the First Annual Review of the Administrative Process) (Panel discussion, negotiations in rulemaking involving, e.g., hazardous waste management, asbestos-containing materials in schools, financial assistance to local education agencies, flight time limitations and rest requirements for airline personnel).

[9] *E.g.*, Edelman, Carr, & Simon, *ADR at the U.S. Army Corps of Engineers*, Pou, *Federal Agency Use of ADR: The Experience to Date*, and Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT (Fine, ed. 1987); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L. J. 399 (1987) (entire issue devoted to this colloquium); Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1983-84); Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L. J. 141 (1987); Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L. J. 125 (1987).

[10] H.R. 2497, 101st Cong., 1st Session (1989); *see also*, Lavelle and Samborn, *Congress Now Considering Dispute Resolution Measure*, The National Law Journal, Feb. 5, 1990, at 1, col. 1.

[11] Rules of Procedure, 29 CFR §2200.100 - .102 (1990). OSHRC's Rules of Procedure will hereinafter be cited as 29 CFR §2200.xxx.).

[12] 29 CFR §2200.200 -.212 (1990).

[13] 29 U.S.C. §§651-678 (1988).

A. The Settlement Judge

Judicially-encouraged settlements, of course, are nothing new.[14] However, the judge who becomes too active in settlement negotiations incurs the risks of departing from neutrality, appearing biased in favor of one party, and losing effectiveness not only as a settlement facilitator,[15] but also as an adjudicator.[16] If negotiations fail, and the judge goes ahead and tries the case, the judicial activism in encouraging settlement may lead to motions to recuse on grounds of bias, or furnish ammunition for appeals.[17] In the administrative law setting, these problems are even more acute. The adjudicative hearing officer (usually an administrative law judge, hereinafter, ALJ) is, despite a large measure of independence, still not a member of the judicial branch of government. The ALJ or other administrative hearing officer must be particularly scrupulous and sensitive about avoiding the appearance of favoritism. Statutory constraints on the ALJ's conduct, such as prohibitions on ex parte contacts,[18] impose further limitations on an ALJ's flexibility in the settlement context, if he is to be the adjudicator who actually hears the case and renders a decision.

The Settlement Judge is a recently developed, but relatively well-defined, concept which is both recognized and recommended by the Administrative Conference (ACUS).[19] The Settlement Judge has been called "an ingenious device,"[20] because it preserves the very real advantages of having a judge actively involved in the settlement process, while it avoids the very serious problems which can arise if the trial judge becomes an overactive participant in settlement negotiations.

A Settlement Judge is simply an ALJ: (1) who is specially appointed for the sole purpose of facilitating settlement; (2) who will not, however, try the case or have any formal decisionmaking authority in the case (unless the parties so request); and (3) who is drawn from the same agency as the trial judge and therefore generally hears the same kinds of cases.[21] A Settlement Judge is essentially a mediator, but a mediator with special status, expertise, and flexibility. Being a sitting ALJ, the Settlement Judge has the prestige of position and the advantage of familiarity with the subject. Being specially appointed, for the limited purpose of settlement negotiations, a Settlement Judge can be flexible, resorting to techniques and methods, such as ex parte communications, off-the-record discussions, and assurances of confidentiality, which the ALJ responsible for actually deciding the case could not use without running afoul of ethical and statutory prohibitions.[22] Insulated from the actual decision-making role, the Settlement Judge can facilitate settlements by candidly informing the parties of his opinion of the merits of a case and his opinion of their prospects for success. In this respect, the Settlement Judge can provide recalcitrant or stubborn parties with a sometimes-needed preview of what might happen if they actually went to trial. Accordingly, the Settlement Judge also performs as something of an analogue to the settlement-enhancing functions of the "mini-trial,"[23] advisory or nonbinding arbitration,[24] and the summary jury trial.[25]

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[14] Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISPUTE RESOLUTION 1 (1987); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986).

[15] *See*, Brazil, *supra* note 14, at 49-50.

[16] *E.g.*, American Bar Association, Model Code of Professional Responsibility and Code of Judicial Conduct (1980) (Canon 2.C., disqualifying himself in proceedings where his impartiality might reasonably be questioned).

[17] *Cf.*, In re Corey, 892 F.2d 829 (9th Cir. 1990).

[18] Administrative Procedure Act, 5 U.S.C. §§554(d), 557(d) (1988); *see also*, 5 U.S.C. §556(e)(limits decision exclusively to matters on the record).

[19] ACUS Recommendation 88-5, "Agency Use of Settlement Judges," 1 CFR §305.88-5 (1989).

[20] D. Joseph & M. Gilbert, "Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings" (Report to the Administrative Conference of the United States) 3 (May 20, 1988). (Hereinafter cited, usually, as Joseph & Gilbert Report).

However, it must be emphasized that the appointment of a Settlement Judge should not be a matter of routine. The Settlement Judge should be reserved for special problem situations, where there are reasonable prospects for settlement, but an impasse or barrier to settlement has arisen, and the parties could benefit from the flexibility and the more active intervention of a Settlement Judge.[26] The Settlement Judge procedure should be used sparingly. It is no substitute for good faith negotiations between the parties. If overused, it would not only tax the limited pool of agency ALJs but also distort the negotiating process.

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[21] *Id.*

[22] *See*, ACUS Recommendation 88-5, "Agency Use of Settlement Judges," 1 CFR §305.88-5 (1990); 5 U.S.C. 557(d)(1)(1988) (*ex parte* communications).

[23] Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L. J. 141, 150 (1987).

[24] *Id.* at 151; Hensler, *What We Know and Don't Know about Court-Administered Arbitration*, 69 JUDICATURE 270 (1986).

[25] Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984); Lambros, *The Summary Jury Trial--An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U.CHI. L. REV. 366 (1986).

[26] *See, supra* note 20, Joseph & Gilbert Report at 28-32.

B. Simplified Proceedings

The OSHRC Simplified Proceedings, while generically serving a core purpose of ADR, are not so readily identifiable with any particular ADR device or technique commonly included in the ADR lexicons. As the name itself indicates, Simplified Proceedings aim at simplification of the adjudicative process. Their basic purpose is consistent with the goals of ADR, and with the reasons commonly advanced for ADR--eliminating elaborate procedures, minimizing formalities, and reducing the time, expense and other transactional costs of litigation.[27]

Among other things, the OSHRC Simplified Proceedings eliminate formal pleadings, ordinarily bar discovery, motions, or similar filings, and prohibit interlocutory appeals. Any hearing itself is conducted in accordance with §554 of the Administrative Procedure Act, but the Federal Rules of Evidence do not apply.[28]

The concept itself is not revolutionary. As one leading commentator has recognized, "agencies have used informal 'modified hearings' for decades, [although] given the current interest and the growth of experience with alternative means of dispute resolution, it is appropriate to ask when they can be used and how they need to be adapted to meet the dictates of the administrative process."[29] Still, many summaries and lexicons[30] of ADR terminology do not seem to specify simplified procedures as a distinct form of ADR, although the concept of simplifying proceedings is well within the basic ADR rubric. But instead of steering the parties to a less formal tribunal, Simplified Proceedings modify the procedures of the tribunal itself. Moreover, the OSHRC Simplied Proceedings are not totally without analogues. Some mention is made of "expedited procedures" in connection with small cases by ACUS Recommendation 86-7, "Case Management as a Tool for Improving Agency Ajudication."[31] The OSHRC Simplified

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[27] *See*, ACUS Recommendation 86-3, 1 CFR §305.86-3 (1990).

[28] 29 CFR §2200.200, *et seq.* (1990).

[29] Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1411 (1983-84).

[30] *See, e.g.*, ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution" (Appendix), 1 CFR §305.86-3 (1990); National Institute for Dispute Resolution, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (Appendix 2: Lexicon) (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy)(1983), *reprinted in* ADMINISTRATIVE CONFERENCE SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 42-46 (1987). The Administrative Conference Sourcebook will hereinafter be cited as ADR SOURCEBOOK.

[31] 1 CFR §305.86-7 (1990).

Proceedings could therefore be classified among the "case management" techniques which are related to ADR in spirit if not strictly in form.[32] Other analogues which come to mind are New York's Simplified Procedure for Court Determination of Disputes[33] and the various kinds of small claims courts,[34] traffic courts, municipal courts, and other tribunals of limited jurisdiction which are intended to provide a forum for minor cases.

II. Overview of the OSHA System

A. Introduction

Context is always important in understanding virtually any subject. In the case of OSHRC's Settlement Judge procedures and Simplified Proceedings, some knowledge of the context in which these procedures operate is absolutely crucial. The Settlement Judges and the Simplified Proceedings do not stand alone. They are part of an intricate statutory system which in some respects is unique in administrative law. Their use and effectiveness depend on a number of variables. These variables are linked to the nature, policies, and operation of the overall system. Changes in policies and operations elsewhere in the system will affect the frequency and nature--the how often and the how well--of the use of Settlement Judges and Simplified Proceedings.

Before focusing on the OSHRC Settlement Judges and Simplified Proceedings, this Report, therefore, must lay some preliminary groundwork by: (1) providing an overview in this Part (II) of the statutory system, and (2) examining, in Part III, some important differences (and similarities) between the OSHA system and the situation of other agencies where ADR is, or could be, used.

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[32] *See also*, Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation*, Report to the Administrative Conference, January 1988, at 36-37 (describing summary procedures for small contract claims).

[33] *See*, Carlisle, *Simplified Procedure for Court Determination of Disputes Under New York's Civil Practice Law and Rules*, 54 BROOKLYN L. REV. 95 (1988).

[34] *E.g.*, Kulat, *Et al.: Hairy Tales from Chicago's Pro Se Court Where You Don't Need a Lawyer to Help Solve Life's More Vexing Problems*, 13 STUDENT LAWYER 14 (Sept. 1984).

B. Statutory, Policy, Operational, and Legal Context of OSHRC Adjudications

1. Statutory and Policy Background

By any criteria, the passage of the Occupational Safety and Health Act[35] in 1970 represents a significant milestone in administrative law. Substantively, it is the most comprehensive federal law ever enacted to deal with occupational safety and health.[36] Among its stated Congressional purposes is nothing less than "to assure, so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[37]

Jurisdictionally, the OSH Act's coverage of employers and employees in the private sector is, with some exceptions, coextensive with the full scope of the federal power to regulate commerce.[38] An estimated 80 million employees intially were covered by the Act.[39] However, that number has decreased substantially, since more than 20 states have resumed direct enforcement responsibility for occupational safety and health under state programs which satisfy the "state plan" requirements of the Act.[40]

Conceptually, the Act essentially follows a "law-enforcement" model, requiring employer compliance with substantive regulations ("occupational safety and health standards") promulgated by rulemaking.[41] Moreover, the Act imposes a "general duty" on each covered employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."[42] Provision is made for inspections, abatement of violations, sanctions (including civil monetary penalties), and adjudication of disputed cases.[43]

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[35] Pub. L. No. 91-596, 84 Stat. 1590 (1970), codified at 29 U.S.C. §§651-678 (1988).

[36] *See*, M. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §1 (2d. ed. 1983).

[37] 29 U.S.C. §651(b) (1988).

[38] 29 U.S.C. §652 (5) (1988) (employer defined as a "person engaged in a business affecting commerce"); *see*, Brennan v. Occupational Safety & Health Review Commission, 492 F.2d 1027 (2d Cir. 1974).

[39] House Committee Report No. 91-1291 (Committee on Education and Labor) (91st Congress, 2d Session) (July 9, 1970) at 14.

[40] For statutory provisions pertaining to state plans, see 29 U.S.C. §667 (1988). There seem to be 21 approved state plans where states have resumed direct responsibility for occupational safety and health. These states include California, Indiana, Maryland, Michigan, Minnesota, North Carolina, and Tennessee. OCCUPATIONAL SAFETY AND HEALTH REPORTER: REFERENCE FILE (STATE PLANS) (BNA) (1989) The number of employees and employers subject to direct federal enforcement jurisdiction therefore has decreased considerably. Precise figures are not particularly crucial to the present Report, but the substantial number of "state plan" states (some of them populous and industrialized) does have considerable effect on the OSHRC caseload, and thus indirectly on the use of ADR.

[41] 29 U.S.C. §§654; 655 (1986).

(One point should be emphasized at this juncture, a point which will bear repeating later. The system established by Congress essentially follows a "law enforcement" model, which is qualitatively different, in some important respects, from the civil, private-party litigation model which lies at the foundation of most traditional ADR techniques. OSHRC and its ALJs are not refereeing a dispute between private litigants. Although frequently much more complex, litigation under the Act is akin to the enforcement of traffic regulations, building safety and fire codes, and vehicle safety inspection laws. There are highly visible prosecutorial duties and important legal requirements--such as satisfying a burden of proof--imposed on government officials charged with representing the government in disputed cases.[44])

Administratively, the Act takes an almost-unique direction by creating two agencies, instead of a single agency, to carry out the enforcement scheme. The Department of Labor is given the role of promulgating substantive occupational safety and health standards, conducting inspections and investigations, and prosecuting contested cases.[45] The Occupational Safety and Health Review Commission (OSHRC or the Commission) is completely independent of the Department of Labor and adjudicates contested citations and penalties.[46] One commentator has labeled this arrangement the "split-enforcement" model.[47] As will be discussed in Part III, below, this bifurcation is not without potential significance as a factor in the actual use of Settlement Judges, Simplified Proceedings, and other ADR techniques. Briefly, however, this "split-enforcement" system results in a situation where there are two agencies, with different perspectives, different institutional roles, and different policies, which interact and which may have considerable impact on the implementation of any particular form of ADR.

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[42] 29 U.S.C. §654(a)(1) (1988).

[43] 29 U.S.C. §§657, 658, 659, 660 (1988).

[44] See text at notes 79-85, 269-83.

[45] 29 U.S.C. §§655, 657, 658, 659 (1988).

[46] 29 U.S.C. §§659(c), 661 (1988).

[47] Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Eperiences*, 39 AD. L. REV. 315 (1987).

2. Operational and Legal Aspects

Adjudication by OSHRC and its ALJs takes place in the context of an overall system which has features of varying complexity. In addition to the statutory "general duty" clause, there are literally several volumes of occupational safety and health standards (standards) published in the Code of Federal Regulations. One large block of these standards applies to almost all private employers: General Industry and Health Standards, 29 CFR Part 1910. Others, applicable to particular industries, override the general industry standard, in case of conflict.[48] Examples of particular industry standards are found at 29 CFR Part 1915 (Shipyards); 29 CFR Part 1918 (Longshoring); 29 C.F.R Part 1926 (Construction); and 29 CFR Part 1928 (Agriculture).

Some of these standards are relatively precise and simple, involving measurements or common sense precautions. For instance, some General Industry Standards are rather specific regarding "single" portable wooden ladders, which are to be no longer than 30 feet,[49] and two-section extension wodden ladders, which are to be no more than 60 feet long.[50] In the department of common sense, some standards could have been derived from watching old Laurel and Hardy movies. For instance, putting a ladder in front of a door which opens toward the ladder is prohibited, unless the door is blocked, locked, or guarded.[51] Likewise, "ladders shall not be placed on boxes, barrels, or other unstable bases to obtain additional height."[52]

However, other standards are more open-ended, complex, or involve judgment calls. Even the ladder standards sometimes have a distinct element of open-endedness. For example, "Ladders with broken or missing steps, rungs, or cleats, broken side rails, or other faulty equipment shall not be used . . . ."[53] Then there are the machine guarding standards, for example:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the

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[48] *See*, S. Bokat & H. Thompson, OCCUPATIONAL SAFETY AND HEALTH LAW 67 (ABA & BNA 1988).

[49] 29 CFR §1910.25(c)(3)(ii) (1989).

[50] *Id.* at (iii).

[51] 29 CFR §1910.25(d)(2)(iv) (1989).

[52] 29 CFR §1910.25(d)(2)(iv) (1989).

[53] 29 CFR §1910.25(d)(2)(viii) (1989) (emphasis added).

> operator from having any part of his body in the danger zone during the operating cycle.[54]

As to personal protective equipment, there are particular standards, such as those involving eye and face protection,[55] and a kind of "catch-all" general standard, which provides, among other things, "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing . . . and protective shields and barriers, shall be provided . . . and maintained . . . wherever it is necessary by reason of hazards of processes or environment . . . ."[56] "All personal protective equipment shall be of safe design and construction for the work to be performed."[57] Needless to add, these are only some of the less complex standards that may be encountered in cases contested before OSHRC.

Thus, as pointed out in one textbook, there are various ways of categorizing standards. Some are "specification" standards, which detail the precise equipment, work processes, or materials required for compliance; others are "performance standards" which are more flexible and leave the employer some latitude as to the precise method of protecting employees from the hazard; others, such as the housekeeping and personal protective equipment standards, are general and somewhat open-ended.[58] Still other standards, such as those involving employee safety training, hazard communication, and recordkeeping, involve educating employees in safety and health matters, transmission of information and maintaining documentation.[59]

Inspections for compliance with standards and the general duty clause generate a massive number of cited violations annually. In fiscal year 1988, there were around 170,000 alleged violations resulting from inspections.[60] Moreover, the sheer number of standards, the great variety of types of standards and kinds of requirements imposed, and the number of cited violations, are not the only factors complicating the operational and legal aspects of enforcement and adjudication.

The system for adjudicating contested cases, which is easy enough to describe in broad outline, can be as challenging and demanding, and as full of pitfalls, as any litigation anywhere. Procedurally, matters are simple enough on the surface.

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[54] 29 CFR §1910.212(a)(3) (1989)(emphasis added).

[55] 29 CFR §1910.133 (1989).

[56] 29 CFR §1910.132(a) (1989)(emphasis added).

[57] 29 CFR §1910.132(d) (1989).

[58] Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §§93, 94 (1983) and 1989 pocket part, §94.

[59] *Cf. id.*, §95 (also in 1989 pocket part, §95).

[60] [1989] 19 OCCUP. SAFETY AND HEALTH REP. (BNA) 1668 (March 1, 1989).

If inspection discloses alleged violations, a citation describing the violation is issued (including period for abatement of the violation) and there is a notification of proposed penalties, if any. A particular violation may be classified as willful,[61] serious,[62] or other than serious,[63] depending on a number of statutory factors and case precedents. Among other things, the classification may affect the amount of civil penalty proposed or finally assessed.[64]

An employer who disagrees with a citation or proposed penalties can file, within 15 days of receipt, a simple notice of contest.[65] All aspects of the citation and proposed penalties are subject to citation, if timely contested. In some form or other, employers may dispute the existence of a violation, the time allowed for abatement of the violation, the nature of the measures required for abatement, the characterization of the alleged violation (willful, serious, or other), and the proposed penalties.[66] In addition, employees or their representative can elect party status if an employer files a notice of contest[67] (sometimes converting the litigation into a three-cornered affair). Furthermore, employees or their representative are entitled to file a notice of contest to the reasonableness of the time for abatement allowed in a citation.[68] Considerable litigation has resulted over the rights of employees with regard to settlements and other matters; by and large, the rights of employees or their representatives in OSHRC litigation have not been treated expansively.[69] (For the sake of simplicity, this Report generally will not attempt to deal separately with whatever rights employee representatives may have with repect to OSHRC litigation, Settlement Judges, and Simplified Proceedings. The matters discussed in this Report will usually on litigation resulting from employer notices of contest, because employer contests form the vast bulk of the day-to-day litigation in the system.)

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[61] 29 U.S.C. §666(a) (1988).

[62] 29 U.S.C. §666(b), (k) (1988).

[63] 29 U.S.C. §666(c) (1988) (violations "determined not to be of a serious nature").

[64] For a general discussion of the various categories of violation, see Bokat and Thompson, OCCUPATIONAL SAFETY AND HEALTH LAW 257-76 (BNA & ABA, 1988) (Hereinafter cited as Bokat & Thompson).

[65] 29 U.S.C. §659(a) (1989).

[66] For general discussions of notices of contest see Bokat & Thompson, at 350-57; Rothman, OCCUPATIONAL SAFETY AND HEALTH LAW, §§271, 275-78 (2d ed. 1983).

[67] 29 U.S.C. §659(c) (1988); 29 CFR 2200.20(a) (1989).

[68] 29 U.S.C. §659(c) (1988); 29 CFR §2200.38 (1989).

[69] For discussion of employee rights relative to litigation and contested proceedings before OSHRC, see Bokat & Thompson, at 468-80, and Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §§204, 279, 368, and 369.

Except for Simplified Proceedings, OSHRC procedural rules require the Department of Labor's lawyers to file a relatively detailed complaint, after receipt of a notice of contest.[70] This complaint requirement was established by OSHRC regulations in 1986, and represents something of a departure from the conventional "notice pleading" prevalent in judicial tribunals and many federal agency adjudications.

This requirement is significant in terms of ADR, and will be discussed at greater length elsewhere in this Report.[71] However, by way of background, the following points should be noted.

Although expressly intended as a device to impel better preparation of cases for trial,[72] this hybrid "fact-pleading" requirement is remarkably in tune with the goals of ADR and strikingly in accord with the findings and recommendations of a special task force appointed by the chief judge of the federal district court for the Northern District of California in 1982.[73] A lengthy quotation is very much in order on this point:

> A consensus gradually developed in the committee. It became convinced that the place where the most could be saved is in the formative stages of litigation. It is in those stages that patterns and expectations are set and thus it is in those stages where an infusion of intellectual discipline, common sense, and more direct communication might have the most beneficial effects.
>
> The committee identified several facts of early litigation life that make it difficult for lawyers and clients to resolve disputes efficiently. One is notice pleading. Complaints and answers often do not communicate a great deal about the parties' positions and what supports them. . . .
>
> These pleading practices have at least two ill effects on the cost of litigation: parties must use discovery to learn their opponent's basic position and to assay its underpinnings; and the scope of . . . discovery . . . is very broad because the

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[70] 29 CFR §2200.35 (1989).

[71] See text at notes 239-43.

[72] 51 F.R. 32007 (July 7, 1986) (explanation of final rule).

[73] Brazil, Kahn, Newman, & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

> scope of the litigation, as presented through the pleadings, is so broad. . . .
>
> . . . . Another problem is that some lawyers and litigants seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case. . . . Sometimes litigants and lawyers are so pressed by other responsibilities that they can bring themselves to systematically analyze their own cause only when some external event forces them to do so.[74]

Intended or not, the "hybrid fact-pleading" imposed by OSHRC serves an important "case-management" purpose closely related to ADR. It is also one of several factors in the larger context of the enforcement and litigation system which affects the use of Simplified Proceedings.[75]

If a case is not settled, an OSHRC ALJ hears and decides the case.[76] The ALJ's decision is subject to review by OSHRC; and OSHRC's decision (whether in the form of declining to review and thereby letting the ALJ's decision become the final OSHRC decision, or by grant of review and its own decision) is subject to judicial review.[77]

As could have been predicted, a substantial and somewhat complex body of legal doctrines and precedents has emerged from litigation before OSHRC over the past two decades. These developments are relevant to ADR and seem to be very closely linked to the "law enforcement" model of the system, since they involve matters such as the Secretary of Labor's burden of proof, the elements of a prima facie case, and the availability of affirmative defenses to alleged violations. In order to understand better the context in which the OSHRC Settlement Judge and Simplified Proceedings operate, a brief discussion of these elements of the system is necessary.

Even a casual reading of two standard textbooks on occupational safety and health law indicates that OSHRC takes seriously the Secretary's burden of proof and that OSHRC has recognized a substantial number of affirmative defenses. Some of the more significant points regarding the burden of proof and affirmative defenses are summarized below:

-- In cases involving occupational safety and health standards, the Secretary's burden of proof includes establishing that : (1) the cited standard applies to the condition;[78] (2) the employer failed to comply with the requirements of the standard; (3) there was potential or actual employee exposure to the hazard posed by the violation; and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition constituting a violation.[79]

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[74] *Id.* (emphasis added).

[75] See text at notes 239-43.

[76] 29 U.S.C. §661 (1988).

[77] 29 U.S.C. §661, 660 (1988).

-- The type of standard involved will affect the particular evidence necessary to satisfy the prima facie burden of proof. Standards which specify the precise equipment, work processes, or materials required for compliance may require a different kind of evidence than "performance standards" which are more open-ended and leave the employer some latitude as to the precise method of protecting employees from the hazard. Other standards, such as the housekeeping and personal protective equipment standards, are general and even more open-ended.[80] OSHRC'S own procedural rules use the term "general standards,"[81] and refer to standards "under which the obligation of the employer is contingent upon the existence of a hazard," and to standards that do not "specify a means of abatement and [do] not provide a specific performance criterion."[82] Still other standards, such as those involving employee safety training, hazard communication, and recordkeeping, may involve evidence in the form of documents and information within the possession of the employer.[83]

-- In cases involving the general duty clause, the Secretary's prima facie burden of proof includes establishing: (1) that the employer failed to render the workplace free of "recognized" hazards; (2) that the hazard was "recognized" in the industry or by the employer; (3) that the hazard was causing or likely to cause death or serious physical harm; and (4) that there are specific, feasible measures which are likely to reduce the hazard.[84]

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[78] For an example of a simplified proceedings case in which the ALJ declined to allow the Department of Labor to amend a citation which cited an inapplicable standard, see Hoggatt, Inc. 13 OSHC 1642 (BNA)(1988).

[79] Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §102, *et seq.* (2d ed. West 1983); *see also*, Bokat & Thompson at 376.

[80] Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §93, 94, and 1989 pocket part, §94.

[81] 29 CFR §2200.35(d) (1989) ("Additional requirements for complaints alleging violations of general standards.").

[82] *Id.*

[83] *Cf.* Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §95 (also 1989 pocket part, §95).

[84] Bokat & Thompson, at 114-38; Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §§141-149.

-- The potential substantive defenses which could be raised are virtually unlimited.[85]

-- OSHRC's rules are literally open-ended as to what constitutes "an avoidance or an affirmative defense" which supposedly is to be raised in the employer's answer to the Secretary's complaint, because the pertinent rule states: "Such matters include, but are not limited to, the following: creation of a greater hazard by complying with a cited standard; . . . infeasibility of compliance . . . ."[86] These OSHRC rules list at least 9 such defenses.

-- Textwriters have identified a substantial number of "defenses."[87] Among the more significant or complex are: (1) res judicata; (2) vagueness as applied (e.g., where the standard is general or open-ended and the existence of a hazard must be established[88]); (3) unpreventable employee misconduct; (4) impossibility of compliance; (5) compliance with the standard cited would create a greater hazard than noncompliance; (6) technological infeasibility; (7) economic infeasibility; (8) the citation is laid under the general duty clause and a specific standard applied.

-- At multi-employer worksites, such as construction worksites, the proof and affirmative defense picture is even more complicated, involving matters of employer control of the conditions creating a hazard and employee exposure.[89] A substantial percentage of Simplified Proceedings cases arise out of the construction industry.[90]

On the surface, the adjudicative process appears simple and straightforward: citation (including abatement period) and proposed penalty, notice of contest, adjudication before an OSHRC ALJ, subject to review by OSHRC and subsequent judicial review. In actual operation, however, the process is considerably more complicated.

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[85] Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §124.

[86] 29 CFR 2200.36(b) (1989) (emphasis added).

[87] Bokat & Thompson, at 397-41; Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §109-124.

[88] Rothstein, §114.

[89] *See* Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §161 ("Multi-employer responsibility is one of the most difficult areas of OSHA law."), §162-69; Bokat & Thompson, 411-17.

[90] *See,* Appendix A.

C. Historical Context

The history of the Act and its enforcement are also an important part of the context in which the Settlement Judges and Simplified Proceedings operate. That history can be summarized in two words--controversial and fluid.

One academic observer summarized the first ten years of the Occupational Safety and Health Administration's experience succinctly:

> . . . OSHA has experienced profound difficulties . . . . From the outset the Act's implementation has been hampered by underfunding, poor administration, misdirected enforcement, and relentless assaults by critics. Moreover, since 1977, as the federal government has moved to implement the goals of the Act more forcefully, the criticism of OSHA has intensified. Serious questions regarding OSHA's expense, effectiveness, and priorities have been raised . . . .[91]

OSHRC, though less controversial, likewise was not free from perceived problems. "The Commission has been troubled by a lack of unanimity of its members, a lack of consistency in decisions, a lack of clarity in opinion writing, and an inability to decide cases promptly."[92]

The second decade of the Act's history was a bit more placid. To describe most of the 1980's, another commentator has coined the term, "President Reagan's OSHA."[93] More specifically, the tone and pace for the inspection/prosecutorial phase of enforcement during much of this decade was set by Assistant Secretary of Labor (OSHA) Thorne Auchter (1981-84). The hallmarks of this era were great emphasis on: (1) a more cooperative relationship with employers, (2) education and training, (3) on-site consultations, and (4) delegation of increased authority to local OSHA Area Directors to settle enforcement disputes before they became contested cases formally submitted to OSHRC.[94] The momentum of Auchter's administration apparently persisted further into the decade.

Controversy, however, did not go away. Critics pointed to the reduced number of workplaces subject to inspection under the new policies, the 42 percent decline in the number of citations for serious violations, and the enforcement emphasis on recordkeeping violations rather than substantive hazards.[95] As summed up by one commentator near the end of the decade:

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[91] Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71, 72 (1981).

[92] *Id.* at 115 (Footnotes omitted.).

[93] Goldsmith, *President Reagan's OSHA*, 14 EMPLOYEE RELATIONS L. J. 633 (1989).

[94] Congressional Quarterly, FEDERAL REGULATORY DIRECTORY 413-14 (5th ed. 1986); *see also*, [1981] OSHA COMPLIANCE GUIDE (CCH) 10,190.

> [Under a program begun in October 1981] if a company maintained an injury/illness rate below the national average for manufacturing, any OSHA inspection would consist only of a review of the company's own records.
>
> Because this records-only policy put a premium on low injury rates, OSHA launched a controversial program to enforce the Act's records-keeping requirements. . . . By citing a company for numerous willful record-keeping violations, OSHA could accumulate the per-instance penalties to create mega-fines. Consequently, until recently, record-keeping violations have resulted in the largest proposed penalties in the history of the Act.
>
> For the most part, employers were justifiably enraged by the agency's 'overkill' on paperwork issues that had little direct bearing on worker safety and health.[96]
>
> As noted by this same commentator, however, toward the end of the 1980's, OSHA extended the use of its large proposed civil penalties into more substantive safety and health areas, resulting in proposed penalties which ranged from $1.5 to $5.11 million dollars in particular cases.[97]

During the 1980's, OSHRC also underwent a number of changes. However, the most dramatic and the most obvious changes stemmed from a drastic decline in the number of contested cases. At the end of 1980, there were 44 OSHRC ALJ's located in 9 different cities, with 7,515 new cases received during that year.[98] Then, during 1981, incoming cases plunged from the 1980 high of 7,515 to 2,751.[99] In 1982, the decline continued, with 1,242 new cases, and an ALJ cadre of 24.[100] However, in recent years the caseload has been gradually increasing. In 1988, the number of new contested cases climbed to 2,746, with a total ALJ complement of 18.[101]

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[95] Congressional Quarterly, FEDERAL REGULATORY DIRECTORY 414 (5th ed. 1986).

[96] Goldsmith, *supra* note 93, at 639-40.

[97] *Id.* at 640-41.

[98] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission--Calendar Year 1980" p. 2.

[99] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 3 (Calendar Year 1981).

Even this abbreviated treatment of the history of the Act's implementation should make fairly obvious several points of relevance to Settlement Judges, Simplified Proceedings and ADR in the OSHRC setting generally. Principally, and again, those procedures do not operate in a vacuum. Although it is debatable whether OSHA's inspection, enforcement, and precontest settlement policies during the 1980's were the sole cause of the decline in contested cases reaching OSHRC, the correlation of these policies with that decline indicates forcefully that the policies of the inspection/prosecutorial arm are an important variable which can affect the number of cases and the kinds of cases before OSHRC. Consequently, the number and nature of the cases where Settlement Judges, Simplified Proceedings, or other forms of ADR might be employed are affected by policies beyond OSHRC's control. If ADR is to be used in the OSH Act system, therefore, coordination between the inspection/prosecutorial arm and OSHRC would seem imperative.

III. Important Differences and Similarities Between the OSHA System and Other Programs and Agencies Using ADR

A. Introduction

ADR techniques cannot be simply uprooted from one setting and transplanted wholesale to another. A technique or approach which operates successfully in one agency may be disastrous if superimposed on another. Perhaps the surest way to court failure in using ADR is to disregard the very real differences among federal agencies and programs. The Administrative

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[100] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission," 2 (Calendar Year 1982).

[101] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 5, 3 (Fiscal Year 1988).

Conference has stated very aptly, "the best procedure for a program, or even an individual dispute, must grow out of its own needs."[102]

In several important respects, the OSH Act adjudicative system is different from other federal programs in which ADR has been evolving with considerable success. These differences do not mean that ADR is irrelevant or unsuitable in the OSHA setting. Actually, these differences offer significant opportunities to experiment, develop, and extend ADR techniques into some new territory. However, these differences must be considered carefully in designing and implementing ADR within this particular system.

B. Differences from Government Procurement Disputes

1. Relationship of Parties

One of the earliest and most promising areas for application of ADR in administrative law has been disputes arising out of government procurement and contracting. The problems and basic "landscape" of government contract appeals litigation have been described in a recent ACUS Report.[103] However, the relationship between the parties to a contract dispute is different in substantial respects from the relationship between the parties under the OSHA scheme.

In goverment contracting, there is a commercial transaction between the parties. There is nothing inherently adversarial in the relationship. Indeed, the underlying relationship is voluntary, bi-lateral, cooperative, and often very symbiotic. Would-be contractors compete against each other for the privilege of dealing with the government. (Insofar as can be determined, there is no competitive bidding among employers for the privilege of being inspected under the OSH Act.)

In contracting, the relationship between the parties literally begins with accord and agreement--a contract. Any disputes arise later. To a large extent, the working relationship between company managers and government officials is primary. From the perspective of company and government managers, legal relationships established by a contract are very secondary; they are the tail, which should not wag the dog.

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[102] ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1990).

[103] Crowell and Pou, APPEALING GOVERNMENT CONTRACT DECISIONS: REDUCING THE COST AND DELAY OF PROCUREMENT LITIGATION 3-8 (Report to the Administrative Conference of the United States, January 1988). (Hereinafter cited as Crowell & Pou).

Moreover, disputes which culminate in "litigation" can impair ongoing or future commercial relationships between the parties. If one party prevails in litigation, the outcome may be so unsatisfactory to the other party that future dealings are difficult if not impossible. The party who "wins" the litigation often loses that intangible known as good will, and risks losing a customer or provider of goods and services.

In short, there are strong extra-legal incentives for reaching accord in contract disputes, including but not limited to future relationships. Perhaps the most important service performed by ADR in government procurement is to repair an existing commercial relationship.[104]

In contrast, the OSH Act system involves government-imposed regulatory requirements. There is no underlying commercial transaction or relationship. Although there is a strong mutual interest in workplace safety and health, the relationship hardly can be called voluntary and symbiotic. The relationship contains some degree of inherent adversariness, because of possible citations, monetary sanctions, and expensive abatement measures. No matter how cordial the opening conference with an OSHA compliance officer might be, inchoate disputes and adversariness exist at the outset of the relationship.

Nor is the relationship on-going. Inspections are more or less sporadic. A government contractor ordinarily hopes for another contract. An employer ordinarily will not hope for another OSHA inspection. The extra-legal incentives for reaching accord in a dispute under OSHA do not include the prospects of future profits on the one hand, and future procurement of goods and services, on the other. There are no continuing or future commercial relationships which provide an incentive to use ADR; the incentives go more to avoiding future entanglements with OSHA. Accordingly, ADR in the OSH Act system would serve a very different function than it would in government procurement disputes. ADR in the OSH Act system does not repair an existing commercial relationship. It may, however, serve to mitigate and "soften" the adversarial aspects of the regulatory relationship.

2. Models, Analogues, and Traditions

Another important set of differences between contract procurement and OSHA is found in the radically different models on which the two are based, and in the ADR analogues and traditions related to those models. ADR in government contracting can draw on abundant models, analogues, and traditions in the private sector. Despite statutes, regulations, and bureaucracy, a contract with the government is a still a contract. The essence of the transaction is commercial. A contract is a business relationship, as well as a legal relationship.[105] Citation is hardly needed for the proposition that commercial arbitration, commercial mediation, mini-trials and other ADR techniques predate, and are available models for, government contract dispute resolution.[106] A major theme of the recent ACUS study on the use of ADR in government procurement litigation is that ADR "methods successfully help resolve private conflicts raising questions similar to those heard by [Boards of Contract of Appeals],"[107] and that "many government contract cases resemble those others where ADR has been applied successfully."[108] ADR techniques in government procurement can be drawn from a well-developed and still-developing wealth of innovations and techniques in analogous private commercial dispute resolution.

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[104] *See, e.g.*, Rich, *Alternative Dispute Resolution: Opening Doors to Settlement* 28-30 (Aug. 14, 1985). (Reprinted in ADR SOURCEBOOK 71-73.

In contrast, the OSHA system is largely based on a "law-enforcement" model. The government inspects for compliance with the law, requires correction of conditions violating the law, and can impose sanctions for noncompliance. The dispute is public, not private. The dispute is between a government agency and a citizen or company. Available analogues include enforcement of traffic laws, building codes, and other "police power" regulations. ADR certainly has no wealth of models readily available from the private sector in these areas. For the most part, the predominant available model remains the "plea bargain," negotiated with the agency or the prosecutorial authority.

Even in those communities where prosecutors and criminal courts have initiated "community dispute settlement" programs to deal with minor crimes, the target has been "minor crimes between people with continuing relationships."[109] In other words, these programs focus on cases which are criminal in theory, involving conduct chargeable as assault, petty theft, or harassment, but which often are the by-product of disputes and troubled relationships between individuals.[110] Under the OSH Act system, an employee complaint may trigger an inspection, but any underlying friction between employer and employees is largely irrelevant to the existence of workplace hazards and noncompliance with the law. Resolving a neighborhood dispute may moot a criminal charge; resolving labor disputes will not cause a hazardous condition to disappear. The application of ADR to agencies operating under the "law enforcement" model simply has no strong or obvious analogues in the private sector.

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[105] *Id.* at 30, ADR SOURCEBOOK at 73.

[106] *See*, ADR SOURCEBOOK, at 672, 683, 689. (Reprinting materials from the American Arbitration Association.)

[107] Crowell & Pou, at 9.

[108] *Id.* at 11.

[109] Singer, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 119 (Westview Press, 1990).

[110] *Id.* at 121.

C. Differences from Regulatory Agencies Covering Only One Kind of Industry

Many federal agencies are concerned primarily with regulating conditions in one kind of industry. To name only a few, there are the Federal Communications Commission, the Interstate Commerce Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission.[111] In a number of these agencies, the regulatory focus is on economic matters, such as rate-setting and licensing. Some of the industries have a long history of being closely regulated public utilities. Although there are considerable differences among these agencies, they have in common a "vertical" model, jurisdiction over certain kinds of industries. This results in some crucial differences between them and DOL's Occupational Safety and Health Administration.

In terms of relationships between the agency and the regulated industry, there is a continuing and more or less pervasive regulatory oversight. This close relationship has led to criticisms that agencies often have been "captured" by the very industry they are supposed to control, although such contentions often reflect considerable oversimplification.[112] However, the working relationship between agency and industry under such regulatory regimes is a relationship of continuity and constant interaction.

This has implications for ADR in those agencies, which would not apply in the OSH Act context. The relationship between such agencies and their regulated industries is in some respects similar to the relation between contracting agencies and contractors. There is an ongoing relationship, with considerable continuity and stability. Consequently, within the system itself there are strong incentives to accommodation. Antagonism and harsh adversariness are counterproductive, on both sides. To put it colloquially, the industry and the agency have to live together. Both have to take a long-range view. The incentives for coexistence and cooperation, rather than hostility and confrontation, are strong. These incentives make for an atmosphere where ADR techniques and mechanisms are likely to be used, even though the agency and the industry officials may never have heard the term "alternative dispute resolution."

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[111] For a good summary of these and other federal agencies' jurisdiction and missions, see Congressional Quarterly, FEDERAL REGULATORY DIRECTORY (5th ed. 1986).

[112] *See e.g.*, Frohnmayer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A.J. 871,872 (1980).

Of course, for some major national corporations with a large number of worksites and a coordinated safety and health policy, the difference between other regulatory systems and the OSH Act system may be marginal. The incentives for cooperation are fairly strong. Although a particular plant or worksite may be inspected infrequently, there is cumulatively an on-going relationship of sorts when a company has dozens or hundreds of worksites throughout the country. Nevertheless, compared to those agencies which regulate only one kind of industry, the Department of Labor's Occupational Safety and Health Administration has only a sporadic, discontinuous relationship with most of those whom it regulates. The incentives to settle disputes do not include the strong need to preserve and foster a smooth on-going regulatory relationship.

In addition, the nature of regulation in many other agencies may be qualitatively different from that of the OSH Act system. Industries of the same kind will be more homogeneous and therefore present similar problems, which are more susceptible to regulatory solutions which can be applied uniformly throughout the system. Under the OSH Act system, the regulated industries are very heterogeneous. Many workplace hazards and conditions may vary radically from industry to industry. The construction industry, for example, presents unique safety problems stemming from the fact that the workplace literally changes hourly, as the building progresses. Also in the construction industry, there are unique enforcement problems posed by the way in which the industry does business, with a constant coming and going of numerous subcontractors, all of them employers with employees, doing specialized jobs--e.g., excavation, electrical work, plumbing, carpentry, ironwork, dry walling, painting, heating and air conditioning, to name only some.

Furthermore, many other agencies primarily are concerned with the economic or special aspects of the regulated, more or less homogeneous industry--rates, routes, broadcast frequencies, return on investment, etc. Under the OSH Act, economics is secondary, and, again, the regulated industries are a heterogeneous collection of diverse interests with wildly differing workplace conditions.

D. Differences from Most Agencies' Policy-Setting

The so-called "split-enforcement" model established under the OSH Act has advantages and disadvantages, strengths and weaknesses.[113] One point is fairly clear, however. The existence of a separate, independent adjudicative agency has consequences for the implementation of ADR under the OSH Act.

Under most regulatory systems, there is a single, ultimate policy-making authority, whether a cabinet official or an independent board or commission. Although this policy-making authority in most agencies must respect the independence of ALJs and may be limited in its control of particular adjudications by law[114] or by simple considerations of public relations and fairness, a unified policy can be imposed regarding such matters as ADR. All components of the agency can be consulted, with policy differences debated and resolved internally, before proposed rulemaking or other steps are taken. Put in the most blunt and simple terms, the ultimate policy-making authority in most agencies can decide that certain ADR techniques will be used in certain situations, and everyone else in the agency is expected to sit down, shut up, and implement the policy throughout the system. In a "split-enforcement" system, there are two independent policy-makers, heading two agencies, whose personnel may be implementing two different sets of policies.

Perhaps more importantly, if there are features in some other part of the enforcement or adjudicative system which could adversely affect the implementation of ADR policies, appropriate adjustments can be made by a single policy-making authority. In other words, policies within a single agency can be coordinated, so that the enforcement and prosecutorial arms, for instance, are not working at cross-purposes with the adjudicative hearing or appeals component. To take a simple example, a one-headed agency which decides to reduce the paperwork and documentation previously required for the settlement of a case does not have to be concerned, for long, about cooperation from its adjudicative branch. However, as indicated elsewhere in this Report, the OSH Act's bifurcated system resulted in a situation where the very power of the enforcement arm to withdraw a citation was for a time a matter of some dispute.[115]

Unfortunately, the impact of one of the two agencies' policies upon ADR is not always going to be obvious. Incentives and disincentives to use the ADR machinery established by the adjudicative agency can be affected by the policies of the enforcement agency, and vice versa. New inspection priorities, new programs, reallocation of resources, and other policy changes in the enforcement arm will affect the nature and number of cases contested before the adjudicative agency. For example, the availability of informal prenotice-of-contest conferences with OSHA area officials could be expected to reduce the number of contested cases, but those informal conferences also probably reduced by a considerable number the cases where simplified proceedings would be requested, at the very time that simplified proceedings were established.[116]

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[113] *See generally*, Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and the MSHA Experiences*, 39 AD. L. REV. 315 (1987).

[114] *E.g.*, 5 U.S.C. §§554(d)(2), 5372, 7521 (1988).

[115] See text at notes 144-45.

None of this detracts from the value of a statutorily independent adjudicative agency. However, it does once more point up the need for tailoring ADR mechanisms and techniques to the unusual enforcement system that exists under the OSH Act. ADR mechanisms established by one agency in a "dual enforcement" system may be rendered useless, or worse, by policies of the other agency which are outside its control.

E. An Important Similarity: External Constraints

There is one feature that the bifurcated OSH Act system shares with virtually all other agencies. Neither the Department of Labor nor the OSHRC are free agents. Without statutory authority, the Department of Labor could not promulgate legally enforceable safety and health standards, and the Commission could not adjudicate anything. Although, like all agencies, they have a considerable range of authority which can be implied from their respective statutory mandates, there are judicially enforceable limits on that authority.

Moreover, there are abundant extra-legal constraints. The Department of Labor, and to a somewhat lesser extent OSHRC, are demonstrably subject to media, interest group, and Congressional scrutiny. Merely browsing through the index to one of the periodicals devoted to occupational safety and health will disclose numerous examples of this scrutiny of agency policies and actions.[117] Congressional scrutiny is constant and sometimes touches on matters clearly related to ADR. For example, the General Accounting Office conducted a study of the informal conferences at Area Director's offices.[118] The reaction of those outside the agency to changes in enforcement, settlement and ADR policies must be taken into account in making and implementing those policies.

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[116] See text at notes 130-37.

[117] *E.g.*, [1988] 18 OCCUP. SAFETY & HEALTH REP. (BNA) 793 (Sept.7, 1988)(OSHA "mega-fine" enforcement strategy criticized by National Safe Workplace Institute); *id.* at 799 (Congressional inquiry regarding promotion of individual to position of OSHA deputy administrator); *id.* at 1045 (Oct. 19, 1988)(Solicitor of Labor response to GAO study:"Getting Away with Murder In the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations"); *id.* at 1047 (BNA, Oct. 19, 1988)(union protest, including a 3,200 foot long list of companies alleged to have violated toxic chemical regulations).

F. Conclusions

All of the above notwithstanding, ADR is still significant in the OSH Act context. However, the basic point is that the particular features of the OSH Act system must be taken into account in devising ADR techniques and machinery. The ADR experience and machinery of other agencies cannot be superimposed mindlessly on the OSH Act system. Adaptation, evolution, and experimentation are necessary. The ADR techniques and machinery must flow from, and be compatible with, the experience and nature of this particular regulatory context.

Moreover, given the inherent regulatory, investigative, legalistic, and adversarial elements of the OSH Act system, ADR may be quite important as a means to reduce tensions and frictions within the system. Very few people who have ever gotten a ticket for speeding, running a stop sign, or driving around with malfunctioning turn signals are happy about it. An OSH Act citation can be much more serious and much more expensive. A certain amount of antagonism is a natural response, especially if one feels unfairly treated.

The inherent frictions and adversariness of the OSH Act system can be tempered at least. OSHRC could be crucial as a mediating influence for workable accommodations, without compromise to safety and health. OSHRC is detached from both parties, independent and adjudicative. Its adjudicative role makes it a natural focal point for developing ADR techniques and machinery in cases which have been contested. However, great care must be exercised. OSHRC's credibility as a neutral adjudicator is crucial. The development, implementation, and viability of ADR techniques within the adjudicative setting largely depend upon OSHRC and its ALJs.

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[118] See text at notes 225-228.

IV. OSHRC Settlement Judges and Simplified Proceedings

A. The Common Context Shared by Settlement Judges and Simplified Proceedings: A Settlement-Prone System

Taken as a whole, the OSH Act enforcement and adjudicative system is strongly settlement-prone. This becomes quite obvious after considering a few available statistics. About 60,000 to 70,000 OSHA inspections occur annually,[119] with approximately 170,000 alleged violations being found.[120] The great bulk of the cited violations are not contested. For example, OSHRC statistics for FY 1988 reported 2,746 new cases received.[121] Although many of these FY 1988 cases probably involved notices of contest challenging more than one cited violation, it is safe to conclude that no more than 15% of the alleged violations are contested before OSHRC.

Of the cases actually contested before OSHRC, around 90% are resolved, ordinarily by settlement, without a hearing before the ALJ. However, OSHRC rules do require settlement agreements to be approved by the ALJ,[122] so OSHRC tallies cases settled as also being "decisions." Thus, of 2,279 decisions rendered by ALJs in FY 1988, 154 were rendered after a hearing (@ 7%);[123] the rest presumably were mostly settlements. Of 1,813 decisions rendered by ALJs in FY 1987, 190 were issued after a hearing (@ 10.5%).[124]

Rather obviously, the number of cases actually litigated in hearings before an OSHRC ALJ represent a mere fraction of the violations alleged in citations issued by OSHA. There are a number of factors which account for this. As will be discussed briefly below, the more obvious factors making for a system conducive to avoiding formal litigation include: (1) extra-legal factors, primarily the "costs" (in the broadest sense of the word) of litigation, coupled with; (2) the availability of informal conferences with the DOL OSHA Area Director, prior to filing a notice of contest; (3) DOL's own policies; (4) judicial precedents relevant to settlements; (5) OSHRC rules and policies encouraging settlement; and (6) the interaction of all these factors.

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[119] *E.g.*, [1988] OCCUP. SAFETY & HEALTH REP. 859 (BNA) (Sept. 21, 1988) (statistics reported for FY 1986 and 1987).

[120] *E.g.*, [1989] OCCUP. SAFETY & HEALTH REP. 1668 (BNA) (March 1, 1989) (FY 1988 statistics reported).

[121] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 5 (FY 1988). (Hereinafter, OSHRC Annual Report FY 1988.)

[122] 29 CFR 2200.100 (b), (c) (1989).

[123] OSHRC Annual Report FY 1988 at p. 5.

[124] *Id.*

The extra-legal factors providing an incentive against filing a notice of contest in the first instance are easy to comprehend as a matter of common sense, although probably difficult to document in rigorous empirical fashion. Simply put, the most obvious disincentive to filing a notice of contest is the "costs" of contesting, compared to the potential benefits.[125] In the first place, many citations involve violations which would be upheld if contested. In the second place, even if a viable dispute may exist, the amount of civil penalty directly at stake is likely to be far less than the financial expense of contesting. Even if a lawyer is not retained, and the civil penalty is more than $1,000, a company appearing pro se through one of its management officials inevitably sacrifices the time of its officials and witness-employees.[126] Moreover, the less tangible "costs" of contesting a citation may be considerable: potentially adverse publicity,[127] a fear that contesting a citation will increase the possibility of future inspections or inspections at other company worksites,[128] potential workplace friction with unions or nonunionized employees, and the risk of being perceived as insensitive to workplace safety and health.

Nor are the "costs" of full litigation burdensome solely on the employer. The government's resources are finite, and its agencies are staffed by human beings. Every inspector who has to testify at a hearing is an inspector who is not at a workplace looking for hazards to employee safety and health. Every government attorney trying a case which could legitimately have been settled has been diverted from other cases. Even more importantly, every contested violation represents a possible hazard which, if the notice of contest has been filed in good faith, does not have to be corrected before the litigation process has run its course.[129]

Closely related to these general extra-legal factors is the availability, especially since 1980, of informal conferences with the Area Director. By joint memorandum dated September 8, 1980, the Solicitor of Labor and the Assistant Secretary of Labor for Occupational Safety and Health authorized

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[125] *See*, Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §271.

[126] Sand, *Contesting 'Blockbuster' Citations: Recent Decisions in Several Areas*, 14 EMPLOYEE RELATIONS L. J. 123 (1988).

[127] *Id.*

[128] *Id.* at 123-24.

[129] 29 U.S.C. §§659(b), 666(d) (1988). For a general discussion of problems stemming from these provisions, see M. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §298.

OSHA's Area Directors to enter into informal settlement agreements with an employer prior to notice of contest being filed.[130] With Area Directors being authorized to reduce penalties, modify abatement dates, reduce the characterization of the violation (e.g.,, from serious to other-than-serious), and even withdraw a citation,[131] OSHA itself provided a significant ADR mechanism. Although notices of contest must be filed within 15 days after the citation or notice of proposed penalties is served,[132] this still leaves time for many disputed violations and penalties to be resolved by informal conference with the Area Director. A pro se employer therefore can avoid most of the costs associated with litigation if a conference with the Area Director is successful. Moreover, if there are disputed matters which cannot be resolved within the fifteen-day period, an employer still has an opportunity to continue negotiations with the Area Director after filing a formal notice of contest with OSHRC. Generally, if there is reason to believe that a settlement is likely, the Area Director can request authority to continue negotiations while the case is still in the pleadings stage, in an effort to settle the matter.[133]

The impact of these policies was reflected by the immediate drop in the number of contested cases which occurred after their implementation in 1980. After the first two months, the notice of contest rate had declined from 28% to 14%, and the average number of contested cases received by OSHRC had declined from an average 160 new cases per week to 60 new cases per week.[134] During calendar year 1981, OSHRC also reported 2,751 new cases, as compared to the previous year's total of 7,515.[135] Of course, most of the cases informally settled with OSHA prior to notice of contest probably would be among the 90% of those cases settled after notice of contest anyway, but the availability of informal conferences is most certainly a factor conducive to settlement.

In sum, many disputed violations and proposed penalties never ripen into a full-fledged notice of contest and litigation, because they are resolved informally at the Area Director's level.[136] As noted in a recent text oriented to the practising attorney, "it is the general experience that an employer may obtain a reduction in the Secretary's proposed penalty of 50% in settling an OSHA citation."[137]

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[130] [1980] 10 OCCUP. SAFETY & HEALTH REP. 533 (Oct. 16, 1980).

[131] *Id.* at 552 (text of Joint Memorandum).

[132] 29 U.S.C. §659(b) (1988).

[133] *Id.* at 553.

[134] [1981] OSHA COMPLIANCE GUIDE (CCH) 10, 191 (April, 1981).

[135] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 3 (CY 1981).

[136] It should be noted that the implementation of these policies has not been free from criticism. A General Accounting Office study of 150 randomly selected informal OSHA settlements during 1983 indicated that the average penalty reduction was more than 50%. The study also found that the proposed penalties had been reduced in all but one of the cases. Of the

A third important factor is DOL's own policies. In addition to settlement authority at the Area Director level, other DOL policies can influence, directly or indirectly, the number of contested violations and penalties. For the first half of the 1980's, for example, various programs recognizing firms with excellent safety programs, making exemptions from routine inspections, providing consultative visits by OSHA inspectors, and a generally cooperative atmosphere[138] probably had both a direct impact on reducing notices of contest, and the indirect effect of setting the overall tone for agency enforcement activity. When the Assistant Secretary fosters a program which commits resources to some 25,000 consultative visits a year by agency inspectors, under which employers are not cited for violations,[139] the number of enforcement inspections, and cited violations necessarily will decrease. As described by one source, Assistant Secretary Auchter "initiated a policy of settling potentially contested cases in a way that eliminated the hazard but precluded the involvement of the commission."[140] By April 1985, 3 percent of the citations were being contested, compared to 22 percent in 1980.[141] Moreover, the "voluntary compliance" policies during this same period also limited many enforcement inspections to review of an employer's own records, if the employer's injury/illness rate was below the national average for manufacturing.[142] This policy, in turn, led to an emphasis on recordkeeping violations, numerous citations for "wilfull" violation of recordkeeping requirements, and penalties much larger than penalties proposed for many

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946 violations alleged in the 150 cases, however, only 24 had been reduced in character (e.g., serious to other-than-serious) and 15 withdrawn.

[1985]OSHA COMPLIANCE GUIDE (CCH) 11,472 (January 1985) (summarizing INFORMAL SETTLEMENT OF OSHA CITATIONS: COMMENTS ON THE LEGAL BASIS AND OTHER SELECTED ISSUES, GAO/HRD-85-11 (Oct. 26, 1984).

[137] Bokat & Thompson, at 316.

[138] Congressional Quarterly, FEDERAL REGULATORY DIRECTORY 414 (5th ed. 1986).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Goldsmith, *President Reagan's OSHA*, 14 EMPLOYEE RELATIONS L. J. 633, 639 (1989).

violations which had resulted in death or serious injury.[143] In short, as the inspection arm's policies change, so do the number and kinds of cases which are contested.

A fourth factor which emerged during the 1980's was explicit judicial recognition of DOL's authority to withdraw a citation which had been contested, and implicit recognition of substantial authority in DOL to settle disputed cases. In a brief per curiam opinion, the Supreme Court indicated that the Secretary's decision to withdraw a citation was not reviewable by OSHRC.[144]

> It is the Secretary, not the Commission, who sets the substantive standards for the work place, and only the Secretary has the authority to determine if a citation should be issued to an employer . . . . A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer . . . . The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced . . . . Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.
>
> The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act . . . . Such a procedure would also allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend . . . .[145]
>
> Although the case itself more narrowly concerned withdrawal of citations, the Court seemed to go out of its way to mention that DOL should not be discouraged from seeking settlements.

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[143] *Id.* at 640; R. Sand, *Contesting 'Blockbuster' Citations: Recent Decisions in Several Areas*, 14 EMPLOYEE RELATIONS L. J. 123, 124 (1988). *E.g.*, [1987] 16 OCCUP. SAFETY & HEALTH REP. 916 (BNA) (Jan. 21, 1987) ($1.38 million proposed penalties against Union Carbide).

[144] Cuyahoga Valley Railway v. United Transporation Union, 474 U.S. 3 (1985).

[145] *Id.* at 6-7.

Finally, OSHRC itself has never been hostile to settlements. However, its early rules and policies did impose several conditions required for OSHRC approval of a settlement. For instance, at one time OSHRC rejected settlement agreements containing exculpatory language relative to the fact of violation,[146] although it later retreated from this position.[147] In 1986, OSHRC deleted from its rules a requirement that had provided for approval of a settlement agreement "when it is consistent with the provisions and objectives of the Act."[148] Responding to an objection to this deletion, OSHRC stated: "The Commission believes that deletion of this provision from the Commission's rules is in keeping with the Commission's limited role in reviewing settlement agreements."[149]

Current OSHRC rules of procedure are notably lacking in substantive requirements as to content. "Policy. Settlement is permitted and encouraged by the Commission at any stage of the proceedings."[150]

> Requirements. The Commission does not require that the parties include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided . . . , and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. Unless the settlement agreement states otherwise, the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice.[151]

The net result of the factors discussed above has been a system where 90% of the cases are resolved without formal litigation. Settlement is the norm in this system. The attitudes and expectations of lawyers and parties familiar with the system are geared toward settlement, and as the Joseph and Gilbert Report indicates, expectations and attitudes are an important element in achieving settlement.[152]

> Most litigating lawyers are aware of a phenomenon which occurs when it becomes clear that a case will be settled.

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[146] Matt J. Zaich Construction Co., 1 OSHC (BNA) 1225 (1973).

[147] Farmers Export Co., 8 OSHC (BNA) 1655 (1980).

[148] 51 FR 32013 (Sept. 9, 1986) (quoting prior rule 100(a)).

[149] *Id.* (Emphasis added).

[150] 29 CFR §2200.100 (a) (1989).

[151] 29 CFR §2200.100 (b) (1989).

> There is an attitudinal change, sometimes partially or wholly marked, when difficulties and disagreements become things to be understood and ironed out; from then on effort is expended on resolving differences rather than developing them into adversary positions.[153]

In a system where settlement is the norm, experienced parties, particularly DOL officials and their lawyers, are likely to begin with the attitude that the contested case can be worked out, and there is not even a need, on their part, for an "attitudinal change." Moreover, lawyers in cases contested before OSHRC, particularly DOL lawyers, not only develop a mind-set inclined toward expectations of settlement, but also gain necessarily some degree of expertise in negotiating and settling 90% of contested cases. Techniques for arriving at alternatives, adjustments, and compromise become part of the experienced lawyers' working tools. To a certain extent, then, litigating any case of a type which is usually settled represents a departure from the norm.

Overall, the Settlement Judge procedures and Simplified Proceedings operate in the context of a system which is already very conducive to resolving cases without full and formal litigation. The various "costs" of formal adjudication, the policies of the prosecutorial agency, and the encouragement of the adjudicative agency provide substantial incentives and opportunities for settlement. This settlement-prone environment does have some consequences, however, for the use of Settlement Judges, as will be discussed below.

B. OSHRC Settlement Judge (SJ) Procedures & Experience

1. Background

OSHRC's rules governing SJ procedures actually predate by almost two years the Joseph & Gilbert Report. The proposed rule was published in June 1986.[154] Described in the notice of proposed rulemaking as "innovative and experimental,"[155] OSHRC's final SJ rule were published on September 8,

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[152] Joseph & Gilbert Report, 1, 22-23, 28-29, 30-31.

[153] *Id.* at 24.

[154] 51 F.R. 23184, 23193, 23207-08 (June 25, 1986).

[155] *Id.* at 23193.

1986, as one component in a comprehensive revision of its rules of procedure.[156]

The SJ procedures apply to notices of contest by employers and actions for fees under the Equal Access to Justice Act.[157] Whenever "there is a reasonable prospect of substantial settlement with the assistance of mediation by a Settlement Judge,"[158] any party can move for appointment of an SJ. With the parties' consent, the OSHRC Chief Administrative Law Judge or the Chairman can sua sponte assign an SJ. It is worth emphasizing that OSHRC explicitly uses the term "mediation" in describing the SJ process.

Although there are minor differences in details, the OSHRC SJ procedures are generally consistent with the key procedural recommendations of the Joseph & Gilbert Report.[159] Either party can veto the the use of an SJ.[160] The SJ proceedings are limited to 45 days in duration,[161] unless extended at the request of the SJ for another 20 days.[162] The SJ is to confer with the parties, may suspend or allow discovery while assigned to the case, and is expressly authorized to communicate privately with each party's attorney (or other representative) regarding concessions and the reasonableness of the party's position.[163] Discussions are usually by telephone,[164] but provision is made for face-to-face conferences.[165]

To the extent a regulation can accomplish this feat, the rule also requires the parties "to be completely candid with the Settlement Judge so that he may properly guide settlement discussions."[166] The SJ also is given rather open-ended authority, appropriate to the mission, "to make such other and additional requirements of the parties and persons having an interest in the outcome as to him shall seem proper in order to expedite an amicable resolution of the case."[167] The SJ proceedings can be terminated if a party fails to cooperate.[168] The confidential nature of the SJ proceedings is maintained by:

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[156] 51 F.R. 32002 (Sept. 8, 1986) (Notice of final rule), codified at 29 CFR 2200.101 (1989).

[157] 29 CFR §2200.101 (a) (1989).

[158] 29 CFR §2200.101 (a)(2) (1989) (Emphasis added).

[159] *See*, Joseph & Gilbert Report, at 40-47.

[160] 29 CFR §2200.101(a)(2) (1989).

[161] 29 CFR §2200.101(a)(3) (1989).

[162] 29 CFR §2200.101(d)(1) (1989).

[163] 29 CFR §2200.101(b) (1989).

[164] 29 CFR §2200.101(c) (1989).

[165] 29 CFR §2200.101(c)(1) (1989).

[166] 29 CFR §2200.101(c)(2) (1989).

[167] *Id.*

[168] *Id.*

(1) providing that no evidence of statements or conduct in SJ proceedings is inadmissible in any subsequent hearing, except by stipulation of the parties;[169] (2) prohibiting later use in litigation of documents disclosed in the settlement process, unless obtained through appropriate discovery or subpoena;[170] (3) prohibiting the SJ from discussing the merits of the case with any other person;[171] and (4) prohibiting the SJ from being called as a witness in any hearing of the case.[172] If the case remains unresolved, in whole or part, the SJ cannot serve as the presiding ALJ, unless requested by the parties.[173]

In terms of the characteristics of the adjudicating body's overall docket, the OSHRC caseload meets two of the three criteria suggested by the Joseph & Gilbert Report, as conditions precedent for establishing an SJ procedure: (1) a large proportion of the cases present factual issues which are not of major precedential importance, and (2) remedies under the Act are susceptible to gradation and compromise.[174] (Under the OSH Act, there is considerable room for adjusting the amount of monetary penalty; the violations may be characterized as to degree, e.g., willful, serious, other than serious, and repeated; and even the details of abatement may be subject to compromise).

However, OSHRC SJ proceedings take place in a setting which only partially meets the third Joseph & Gilbert criterion--crowded dockets with relatively few cases being settled.[175] As noted elsewhere in this report,[176] there is a 90% settlement rate, and settlement is something of a norm for contested cases before OSHRC.

This high settlement rate does appear to have affected the use of SJ proceedings, and the perspective of some DOL attorneys and OSHRC ALJs regarding SJ proceedings. As will be discussed shortly, the high settlement rate and "norm" of settlement do not lessen the importance of having SJ proceedings available, but they do tend to make the SJ an obscure resource which is too easily overlooked or disregarded, because it is, by its nature, seldom used and properly reserved for exceptional situations. In turn, because it is a seldom used procedure which departs from the norm, it is subject to being misunderstood.

As a matter of considerable relevance to the implementation and operation of the SJ procedures during the first three years of their existence, it should be noted that the original proposal in 1986 generated objections and controversy from some key quarters. Five commentors on the proposed SJ rule--the Secretary of Labor and four of OSHRC's own ALJs--opposed its adoption, contending that there was no need for an SJ procedure.[177] OSHRC disagreed, stating:

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[169] 29 CFR §2200.101(c)(2) (1989).

[170] *Id.*

[171] 29 CFR §2200.101(d)(3) (1989).

[172] *Id.*

[173] *Id.*

[174] Joseph & Gilbert Report, at 39-40.

[175] *Id.* at 39.

[176] See text at notes 123, 124.

> [T]here are a substantial number of cases in which use of the Settlement Judge procedure can result in settlement of the case and avoidance of needless litigation. The Commission anticipates that this will occur, most commonly, in cases where, at some time during the pre-hearing stage of the litigation, the parties realize that they do not really want to go to trial but would prefer some other means of resolving their dispute. The Commission believes that, if the option of a mediated settlement is provided expressly and is available to the parties, they will utilize the procedure.[178]

However, OSHRC also took a cautious posture which did not exactly get the SJ procedure off to a running start. In the explanatory preface to its final rule, OSHRC "emphasized . . . that the rule has been adopted and, particularly at the outset, will be implemented, on an experimental basis. The procedure will be used sparingly at first until problems can be worked out."[179]

The new SJ procedures thus began with some handicaps: (1) almost a fourth of OSHRC's own 18 ALJs[180] were demonstrably unenthusiastic; (2) the Department of Labor (the prosecutorial arm of the adjudicative system) initially was opposed; (3) OSHRC itself suggested that SJs should be sparingly used; (4) there was a long history of 90% settlement rates in any event; (5) the total caseload annually (at the time) was around 2,000, so with a 90% settlement rate, this meant about 200 or so cases which would be realistic candidates for SJ procedures; and (6) SJ proceedings, by their nature, should be relatively infrequent. In light of such handicaps, the most surprising feature of the OSHRC experience has not been the small number of cases in which SJ procedures have been invoked, but the fact that a base of experience, some successful use, and continuing, perhaps growing, support, exists for SJ procedures at all.

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[177] 51 F.R. 32014 (Sept. 8, 1986).

[178] *Id.*

[179] *Id.*

[180] The OSHRC Annual Report for 1986 states that there were 18 ALJs employed, and 2 of these were the Chief ALJ and the Deputy Chief ALJ (p.4). Assuming that the objections to the SJ proposal did not come from the Chief ALJ, it is likely that one-fourth of the sitting ALJs who presided over the vast majority of OSHRC cases already had expressed the view that the SJ procedures were unnecessary.

It must be emphasized that, with a total caseload of two or three thousand cases, only about 10% of which ordinarily go to full hearing, there should be, in terms of absolute numbers, only a relative handful of SJ proceedings anyway. In other words, since 90% of the contested cases ordinarily settle, it is in the remaining 10% that one should look for potential SJ cases. A substantial upsurge in the number of SJ requests might be cause for concern, indicating the possibility that the procedure is being used excessively and in situations where it is not particularly appropriate, efficient or useful. The SJ procedures are intended, in the main, to be used when there is some form of impasse or barrier to settlement.

Nevertheless, the small numbers should not detract from the significance of the procedure and the importance of its availability. SJ procedures are for exceptional situations. Without SJ procedures, the only alternative in those exceptional situations would be full litigation and an imposed resolution, rather than resolution by the parties.

However, the exceptional nature of SJ procedures itself means there is one inherent problem, which could be christened the "out-of-sight-out-of-mind" syndrome. As a matter of simple common sense, a specialized tool which is seldom used tends to be forgotten or neglected, unless the user regards it as particularly valuable. It is especially likely that the tool will be forgotten when not only is it specialized and seldom used, but also there are more commonly used tools available and quite adequate for ordinary situations. In the OSHA context, the commonly used tools are bi-lateral negotiations supplemented to a greater or lesser degree by ordinary ALJ encouragement to settle. These tools work, and have worked rather successfully for more than fifteen years, in a system where only about 10% of the contested cases actually go to hearing anyway.

Telling attorneys and ALJs who are experienced in working with the commonly used tools that they should use the SJ procedures is akin to telling someone who regards himself as one of the world's ten best-dressed men that he should consider buying a new suit. To borrow a very apt phrase which surfaced during a conversation regarding SJs, the attorneys in a particular office may not be "attuned to" the use of SJs.

Even attorneys who are involved regularly in OSHA cases may not be "attuned to" a specialized procedure of recent vintage. It is not that they are hostile to the procedure. It is not that they are oblivious to its existence. It is simply that they are not "attuned to" it. Needless to add, the private attorney who seldom handles a contested OSHA case, and who doesn't study the OSHRC rules of procedure, may not know about the SJ alternative at all.

2. Actual OSHRC Experience and Operation

The following account is based on the recollections of OSHRC ALJs and Department of Labor (DOL) attorneys who provided information for this study during the first six months of 1990. Human memory being imperfect, it should be emphasized that the numbers below reflect estimates, unless otherwise indicated. Retirements, transfers, and other forms of employee turnover would have rendered it unfeasible, in any event, to contact every ALJ and DOL attorney who might had been involved, even during the past two years, in an SJ proceeding.

Probably, the number of SJ proceedings during the past two or three years is larger than the total recalled by those who provided information. However, the exact numbers are secondary to the goal of obtaining information on the way in which the SJ procedures have been operating in actual practice. Memories, though faulty, reflect attitudes and perspectives perhaps better than a cold record. Particularly when a procedure, like the SJ procedure, is sensitive and confidential in its nature, there will not be much of a written record anyway.

Of the 12 ALJs contacted in the OSHRC field offices, five indicated that they had not served as an SJ. The other seven estimated, with varying degrees of certainty, the number of cases in which they had served as SJ. A total of about 15 SJ proceedings can be estimated as a reasonably conservative figure, but some of these were reported as occurring rather soon after the SJ procedures took effect. Recollections of the earlier and less memorable cases were hazy. These ALJs provided fairly detailed information on six SJ proceedings.

Supervisory attorneys (Counsel for Occupational Safety & Health, hereafter Counsel) in six of the eight Regional Solicitors' offices of the DOL were contacted. In addition, information was sought from seven staff attorneys. Two of the six Counsels reported no SJ cases, although one of them recalled that there had been experimental use of the procedure in one case, initiated by OSHRC, prior to the actual publication of the SJ rule, probably in 1986. Four of the staff attorneys had never been involved in an SJ procedure, and two of the others had been contacted precisely because it was already known that they had been involved in SJ proceedings. In total, the Counsels and attorneys recalled about nine SJ proceedings and provided fairly detailed information on five of them. Of these five, three were the same cases reported in some detail by the ALJs. These three cases provide, of course, an interesting opportunity to study the actual operation of SJ procedures from the differing perspectives of the litigator and the ALJ.

Overall, most of the observations, analysis, and recommendations of the Joseph & Gilbert Report are fairly consistent with the OSHRC experience, as related by those who provided information in the present study. Where it seemed to be effective, the SJ procedure did overcome barriers to settlement posed by the adversariness of the situation, the attitudes of the parties, and a party's lack of appreciation for how the deciding ALJ might view the case.[181] Some of the OSHRC SJ cases could serve as textbook models of how the process should work.

However, the Joseph & Gilbert Report may have understated or underemphasized at least two important factors in the SJ process: (1) the interest and aptitude of the appointed SJ;[182] and (2) the need for the SJ to invest some work and effort in becoming familiar with the case.[183] Although the Joseph & Gilbert Report did not neglect these factors, the OSHRC experience and the information obtained in this study, limited as it is, indicates that they can be absolutely crucial.

Two of the most interesting cases which were resolved by using the SJ procedure involved trenching standard violations. The first will be referred to as Case A, partly in keeping with the spirit of the confidentiality of the SJ process, and in any event because the DOL attorney who described the proceedings did not remember the exact case name or docket number.

As described, Case A involved the death of an employee in a trenching cave-in. Here, the SJ seems to have "broken the ice" by giving the parties a candid "preview" of how an ALJ would regard the facts and law of the case. The employer was a subcontractor at the excavation site, and the issues were fact-intensive, involving the classification of the violation as "willful" and the employer's control over the exposure of his employee to the hazardous violation at the worksite. A penalty of about $48,000 had been proposed. The employer's attorney was particularly adamant regarding the "willful" issue. The SJ appeared to be familiar with the evidence in the case, met privately with each party, and then jointly with them, evaluating candidly the case as he saw it. The DOL attorney credited the SJ with helping the parties to get over a major hurdle in the case--the mixed legal and factual issues of what constituted a "willful" violation of the standard and the requisite control. The SJ was described as candid without being arrogant. He analyzed the evidence, simplified the issues, and communicated his perception of the evidence in the course of private meetings and a joint conference which took a total of about two hours. One result was that the SJ's view of the case apparently convinced the employer's attorney that the violation as charged could be established. The case settled with a reduction of about $16,000 in the proposed penalty.

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[181] *See*, Joseph & Gilbert Report, at 30-33.

[182] Joseph & Gilbert at 21.

[183] *Id.* at 35.

Another result attributed by the DOL attorney to the SJ procedures in this case was his perception of an improved relationship with the employer's attorney for settlement in future cases involving the attorney's other clients. Although not discussed in the Joseph & Gilbert Report, the potential for this phenomenon seems natural, in retrospect. It is distinctly possible that an attorney representing members of the regulated industry, after a positive experience (though not necessarily favorable result) with SJ proceedings, would have more confidence in the good faith negotiating position of the DOL attorney. Moreover, knowing the the SJ procedure was available, the attorney would realize that a "test" of the DOL attorney's position--the SJ procedures--is available if the DOL attorney's position seems unreasonable. If the attorneys on both sides know that the SJ procedure is available, then a powerful check exists against crude negotiating ploys such as posturing and bluffing. The attorneys would realize that posturing and bluffing can be tested by invoking the SJ procedure. Somewhat ironically, over the long run, this knowledge might reduce the actual number of times SJs are invoked by informed attorneys who acquire confidence in the bona fides of the positions maintained by their adversary.

Case B involved a more recent trenching case and in many respects it could serve as a textbook example of SJ proceedings. There had been no fatality, but there were citations for two "serious" and one other than serious violations. In this case, the problems confronting the SJ were somewhat more complex, because the dispute was very fact-intensive, turning on the application of the evidence to the standards in question. Again, the "preview" aspect appears to have been crucial. However, because of the fact-intensive nature of the dispute, the SJ had to do more preparation in order to be sufficiently familiar with the case to be a credible mediator and "predicter." The SJ indicates that he studied the file and materials obtained from the parties as if he were actually preparing to hear the case. This was necessary because, among other things, the trenching standards themselves are fairly complex, with a substantial number of requirements which vary, depending upon such factors as the type of soil in which the trench is being dug.[184] Nor was the preparatory work limited to the SJ. He had the parties themselves furnish copies of their file materials to him, in a spirit of laying "all cards on the table." Therefore, the SJ had an opportunity to study documents, pleadings already filed, photographs, reports regarding soil samples, and the positions of the parties. He also retrieved by computer all OSHRC trenching violation cases. Having researched the law and studied the positions of the parties, and after some preliminary coordinating calls and discussions, the SJ held a telephone conference with the parties, including the vice-president of the employer-corporation, a few days after receiving the materials from the parties. From the SJ's perspective, the lengthy conference call (about an hour and a half) involved tough, step-by-step negotiation on a number of key disputed factual issues. He indicated that the SJ procedure in this case could not have succeeded without both parties furnishing to him their file materials, so that he could take a "frank and reasoned position" on the disputed matters. (The ALJ also indicated that all SJ proceedings would not necessarily require this much preparation, but that preparation commensurate to the nature of the disputed issues would be necessary). The SJ also indicated that he liked the "feel of the process." This was the first case in which he had served as an SJ, and he had gone into the process determined to make it work. A true settlement resulted, in the sense that both parties yielded something from their previous positions. For example, one of the violations was, in effect, reduced from serious to other than serious, and the penalties were reduced. The employer receded from its earlier position that there had been no violation. Prior to the SJ proceedings, the parties had been at virtual impasse. As recounted by the DOL attorney, the SJ's methodology included, among other things, a frank appraisal of the evidence, in terms such as, "If I were the trial judge, this is what I'd be looking at . . . this is what would impress me . . . this is what would not. . . ." The SJ pointed out weaknesses in the cases of both parties, giving them a candid "preview." The employer's attorney, in his recollections of the case, described a classic, textbook situation. He indicated that both he and the DOL attorney, respectively, believed they had strong cases. He nevertheless felt that the case was one which should be negotiated, and one in which the parties and their negotiations would benefit if they were able to discern where the Commission "was coming from." He stated that the SJ had done a fine job in handling the case, and he noted that the telephone conference and the whole procedure had saved the client time and expense. (In addition, it should be noted that the SJ when interviewed expressed a strong pro-settlement attitude in general, indicating an opinion that settlements should be encouraged and mentioning his practice of raising the possibility of settlement in all cases prior to prehearing conferences, at prehearing conferences, and even after hearing).

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[184] See, 29 C.F.R §§1926.651, .652, etc., (1989).

In two other cases, which will be referred to as C and D, where interviews for this report obtained enough information on which to venture an analysis, the SJ procedure seems to have been helpful in dealing with another factor noted by Joseph and Gilbert--the attitude of the client as an obstacle to the attorneys' settlement negotiations.[185] In case C, both the SJ and the DOL attorney recalled the case, which essentially had reached impasse on the amount of civil penalties. However, the case also involved some potential substantive complexities, because there were many citations involving hazard communication and safety training standards, and the violations fell into the so-called "egregious" category. The proposed penalties totaled around $400,000. During a one-hour conference, the SJ pointed out that it looked like trial of the case could be very long and drawn-out, involving relatively new standards and violations, some of which might be difficult of proof. The SJ apparently emphasized the relatively small size of the company, the fact that it was already in some financial difficulties, and the ALJ and OSHRC's range of discretion in assessing penalties. Even if a large penalty was assessed, the government might have "to stand in line," so to speak, with a lot of other creditors. The SJ also indicated that he reminded both parties that the case would have to be set for hearing in the relatively near future. The SJ's evaluation and "preview" in this case probably was a significant influence in persuading the DOL attorney's institutional client to settle for dramatically reduced penalty, in the neighborhood of $30,000. In the absence of such a "preview," DOL authorities could have been without much justification in approving such a reduction.

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[185] Joseph & Gilbert Report, at 26-27.

Case D, a recent case in which a settlement had been reached but the paperwork was incomplete at the time of interview, involved a violation of the "general duty" clause, pertaining to exposure to toxic substances in confined spaces. The central issues involved operational and other changes necessary to abate the violation, matters on which special technical expertise would be needed. There were several conference calls and the SJ asked the parties to call him every two weeks to report on progress in their negotiations. The SJ indicated that much of the problem in this case was the attorneys' need to get the clients' approval on technologically complex matters. He recognized that the clients would have to be sold on a settlement and that the attorneys would have to do much of the selling. He also indicated, generally, that the SJ procedure could be helpful in cases where the attorneys were willing to settle, but the clients were reluctant. The SJ's evaluation and views could be impressed on the clients, shifting the onus for potential breakthrough initiatives in negotiations to the SJ.

A very recent case is particularly notable for the technique used by the SJ. The case arose out of an accident resulting in permanent, crippling injuries to an employee. A scaffold was involved, and civil personal injury litigation also was pending. The violations alleged involved improper employee training and improper inspection of the scaffolding. There were issues involving application of the standards to the facts of the particular case, which had its share of unusual features. For example, the building had been under construction and was in the process of being turned over to the owner for occupancy. The standard itself required inspection every 30 days.

At the outset of the SJ procedures, the parties were not inclined at all toward settlement. An initial telephone conference was fruitless. The SJ arranged for an in-person conference, which included both the attorneys and the principals. Most interestingly, the SJ used an innovative technique loosely based on procedures used in a federal district court. He conducted the proceedings in a room which had an adjoining room. Basically, he began by having both parties summarize their side of the case, from their respective viewpoints. Then he met with each side separately, for about fifteen minutes at a time. The procedure seems to have been very efficient and very effective. Basically, the SJ used each period with the parties separately to address a cluster of related matters. During the first period with the parties representing the government, he concentrated on their legal theories of liability under the standards and indicated he had some problems with those theories. He indicated what he viewed as significant problems, and indicated how he would view those problems if he were the deciding ALJ. Then, after about fifteen minutes, he adjourned that conference and conducted a similar conference with the employer's representatives, where he concentrated on problems with the defenses. Next he again huddled with the government's representatives, this time concentrating on facts and evidentiary matters. Strengths and weaknesses in proof were pointed out. Likewise, the same agenda for the next separate session with the employer's representatives addressed problems of proof, such as reconstruction of the accident, and witnesses.

A key feature of this technique of "rotating" the parties in and out was the way in which it gave momentum to the process, while allowing the parties themselves to confer after each segment and assess their position. By chopping the issues into digestable "chunks," and maintaining some mild pressure for intensive reexamination, the process became dynamic.

While the technique certainly is not a cureall or universally applicable, it proved very effective in this instance. Instead of a lengthy conference, after which everybody went home and thought about it, the parties had time to confer on discrete aspects of the case, reassess their position, and consider the issues broken down into manageable segments. The opportunity for the parties to confer among themselves provided an immediate "reality check," as the SJ put it.

However, as the SJ emphasized, it is crucial that the parties not feel they are being "railroaded" into a settlement. They must feel they are part of the process, involved in the resolution of the case. A "blunt" approach can backfire. Therefore it would seem that the particular technique used in this case requires some finesse by the SJ, and works best when the principals, not just the lawyers, are present. However, the intriguing aspect remains the way in which the "in-and-out" cycle gives opportunities for a party's representatives to confer among themselves. This not only lends dynamism to the process, but allows an alert SJ to perceive, by the party's reactions during the next round of discussion, whether he might have erred on the side of bluntness. If so, more finesse can be applied. If the parties simply had adjourned after a more or less group session, with only one "huddle" with each side, the SJ would be less likely to discover any signals that a shift in negotiating tactics might be advisable. After the parties left for the day, it would be too late.

In the case being examined, however, the dynamics of the process had early results. By the end of about two rounds, both sides were in a "settlement mode." The agenda decidedly had shifted to achieving settlement. The parties definitely were motivated to settle, and the conferences, using the same format, shifted to a focus on how to settle. One alleged violation was withdrawn, and the wording of the other citation was modified, with the amount of proposed penalty remaining the same. The SJ also made sure that a settlement agreement was drafted during the session, so that the parties agreed on the wording before the proceedings ended.

Again, the particular technique used in this case is not foolproof. But it does demonstrate at least two important points. First, an SJ must be alert to the possibilities of innovative techniques, and well-versed in different approaches to conducting a conference. The SJ needs some mastery over a fairly broad range of strategies and techniques. Second, the settlement process sometimes should be no less dynamic than an actual trial. Settlements achieved by crude horse-trading may not lead to a very satisfactory resolution of the dispute. Getting the parties involved, keeping them moving, motivating them to reassess their positions instills a sense of participation which, as this case suggests, can be very effective, and efficient. As the SJ pointed out, this case settled after some preparation on his part, an initial telephone conference, and about three hours of an in-person conference. Trial of the case probably would have taken two days, a thick transcript, post-hearing briefs, and about a week to write the ALJ's decision. Moreover, by assuring that representatives of the principals were present, potential further delays were avoided. There was no need to wait for a week or two while the attorneys "sold," or perhaps even failed to sell, the settlement to their respective clients.

In two other cases where information from both the ALJ and DOL attorneys was obtained, the SJ procedures did not, as such, result in a settlement. However, the parties requested that the SJ continue to serve as the regular hearing ALJ. Both cases eventually settled, one virtually on the day of the hearing. Both involved a large number of cited violations and substantial proposed penalties.

Finally, to note that SJ procedures are not always successful, one case involving a penalty under $1,000, noise violations, and disputed facts regarding the operation of fork lift trucks seems to have been a complete bust.

The SJ procedure did not result in settlement, and the net result was simply a two-month delay in resolving or hearing the case.

However, on a more encouraging note, interest in using SJs seems to be growing. The OSHRC Chief ALJ has reported that at least three more SJ proceedings, not discussed in this Report, were pending, as of about June 20, 1990.

3. Analysis and Synthesis

a. Generally

Although there were some variations in the details regarding accounts of particular cases, and in the perceptions and opinions of the participants, there was a fair degree of consensus regarding key factors and variables in deciding to invoke SJ proceedings, and in the successful--and unsuccessful--use of the SJ technique. As to invoking SJ proceedings, crucial factors are: (1) knowledge, awareness, and understanding of the procedure; (2) the individual's confidence in the procedure; and (3) the individual's willingness to take some risks associated with the process. Crucial factors in the successful--and unsuccessful--use are: (1) the attitude, personality, effort of the SJ; (2) the type of case; and (3) the parties' own situation and attitude.

b. Factors and Variables

(1). Factors in Decision to Invoke SJ

Knowledge, Awareness and Understanding.

As elementary as it sounds, a party cannot invoke a procedure which the party does not know exists. Many employers' attorneys may not be aware that the SJ procedure even exists, unless they litigate frequently under the OSH Act. One ALJs indicated that it was rare for the parties to even bring up the possibility of an SJ and expressed the opinion that the ALJs might need to take a more active role in suggesting it. As a matter of plain common sense, an attorney who seldom handles OSHA cases is unlikely to study the OSHRC rules in such detail that the potential for using an SJ will be noticed. It would seem, therefore, that the impetus for using an SJ ordinarily must come from DOL attorneys and the ALJs.

Closely related to lack of knowledge, is the lack of awareness of the SJ procedure. An attorney may "know"--in the abstract--that a seldom used procedure exists, but still may not be "aware" of it, in the sense of being alert to the possibilities of its use in a particular case. Various DOL attorneys, for example, knew the procedure existed but had never participated in a case involving an SJ. An OSHA-experienced lawyer may not be "attuned to" this procedure, because 90% of the cases settle anyway, and under such conditions, there arises an attitude that "if we can't settle it ourselves, we usually try it." In short, the SJ procedures may tend to be "out of sight, out of mind," by their very nature as exceptional techniques.

Related to knowledge and awareness of the SJ procedure is the factor of understanding--or misunderstanding--its key distinguishing features and the advantages of those features. An attorney who understands the nature of the SJ procedures is in a position to invoke them in appropriate situations, neither ignoring nor over-using them. At one extreme were those who seemed to understand clearly the nature of the SJ procedures. One of the DOL attorneys who seemed to be most knowledgeable and enthusiastic about SJ procedures also demonstrated an excellent understanding of the advantages, disadvantages, and limits of the procedures. This attorney understood rather clearly that: (1) the SJ procedures are designed for impasse situations, for example, where the lawyer or client was" adamant" in adhering to a weak position; (2) the SJ is essentially a mediator, a role which requires skill and preparation; (3) there are some kinds of cases where the parties can "sort through" complex or disputed issues better and more effectively "around a table" with an SJ; and (4) the SJ would be of no benefit in situations where the parties are likely to negotiate successfully.

At the other extreme, one ALJ mentioned a case where the employer's attorney had totally misunderstood the nature of the SJ proceedings. Somehow the attorney had formed the impression that the only way to settle a case was to invoke the SJ proceedings.

In between these extremes, the information gathered in the course of preparing this Report indicated varying degrees of understanding of the process. There were ALJs who indicated, directly or indirectly, that they believed the SJ procedures added very little because they are very similar to the regular ALJ procedures. At least one ALJ raised the possibility that, at least in some of the early SJ cases, the parties had invoked the SJ procedures in order to avoid or delay filing detailed pleadings or interposed the SJ proceedings as something of a general delaying tactic. From the other side of the bench, some DOL attorneys likewise indicated an opinion that there was little difference between SJ procedures and the conduct of those ALJs who are somewhat active in encouraging settlements. One indicated that there was little reason to take a case out of its normal track if the ALJ was giving the parties plenty of time to negotiate a settlement themselves. Some of those interviewed indicated that they could not recall any case where there had been a need for a "mediator" in the sense of the full SJ model, or where they had encountered any scenario of the "recalcitrant client" who was impeding an attorney's settlement efforts. Two attorneys who had been in SJ proceedings indicated that the SJ really had not used the full range of techniques available: their perception was that the SJ "didn't do much" or "never was 'actively' involved . . . ."

None of the above should be regarded as any kind of criticism of those involved. However, among some of those who are absolutely crucial to the successful use of SJs, there did seem to be a somewhat hazy notion of how, and when, an SJ could be most valuable, and precisely what an SJ could do, that a regular ALJ could not do.

Given OSHRC's limited resources and its small number of ALJs, optimum use of SJs requires a realistic appreciation of the key differences between the settlement-inducing powers (and limits) of an ALJ who will decide the case, and those of the SJ. An SJ is more than just a new face in the negotiations, or a pinch-hitter for the assigned ALJ or a tactic to gain time.

Confidence in SJs: Experience, Expectations and Perceptions.

If the attorney is aware of, or alert to, the SJ procedures, a key factor in invoking the SJ is the attorney's confidence in the procedure. This confidence, or lack of it, is a resultant of a number of elements, but primarily the attorney's experience with ALJs generally, and his expectations for, and perceptions of, the SJ process. For example, attorneys who conclude, on the basis of an experience with an SJ, that the SJ "didn't do much" or didn't become actively involved, will not perceive the SJ process as being very different from the ordinary pretrial settlement process; they will have low expectations relative to any future use of SJs. Those expectations will be communicated throughout the particular regional office very quickly, and there will be a kind of institutional memory working against future use of SJs.

A more serious problem of confidence can arise for attorneys who have formed a negative perception regarding certain ALJs on the basis of more general experience in past hearings and litigation. These attorneys will lack confidence in those ALJs' ability to function as SJs. Under the present system, SJs are assigned apparently on a rotational basis; several mentioned that an individual was designated to serve as the SJ in their office for a six-month period. The parties cannot select a particular ALJ to serve as SJ, and serious problems of mal-distributed workload might arise if the parties could select an SJ.[186] With no assurance of who will be appointed as SJ, some attorneys will be inclined against invoking the SJ procedures because they perceive no advantages--they will perceive only the negative possibilities of an unfavorable SJ armed with the power of ex parte contacts and the authority to probe and comment on the merits of their case.

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[186] If the parties could choose SJs, like parties choose arbitrators, there might arise the same kind of situation which has been described with respect to labor arbitrators. In the late 1970's it

The present time limits on the SJ process also could be classified as a factor which has some bearing on confidence in the SJ process. Under present rules, the SJ process is limited to a total of 65 days.[187] If a case is complex, with many cited violations and issues, and involves a union, one could conclude that 60 days or so probably would be insufficient and be disinclined to invoke SJ proceedings in such a case. This point has validity. (One case file examined during this study did confirm this potential problem. There were so many cited violations that the complaint was more than 150 pages long).

However, the time-limit problem poses something of a conundrum. On the one hand, the SJ process loses all credibility if it slides into being used as a device to delay litigation. A timeframe of limited duration is crucial in order to assure that the SJ process is efficient and effective. On the other hand, this situation brings to the surface a factor too often under-emphasized by ADR enthusiasts. Mediation in a difficult case is time-consuming and labor-intensive. If the system is unwilling to invest--and risk--time, talent and effort in mediation of complex and difficult cases, mediation should not even be attempted in those cases. Although it may be an extreme and unusual example, one instance of complex, time-consuming mediation in urban planning is described in a recent book as follows: "The group met twenty-three times over the next ten weeks."[188] One is tempted to borrow from a remark attributed to Justice Scalia's about administrative law and say, "Mediation is not for sissies."

Fortunately, in the context of the time limits on the SJ process, at least two possibilities exist for handling the problem under current OSHRC Rules. First, there is a general waiver provision in the OSHRC Rules. Under 29 CFR §2200.107 "In special circumstances not contemplated by the provisions of these rules or for good cause shown, the Commission or Judge may, upon application by any party . . . waive any rule or make such orders as justice or the administration of the Act requires." (Emphasis added).

Second, the OSHRC Chief Administrative Law Judge has suggested an intriguing possibility for creative use of the SJ in complex cases involving

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was estimated that 90% of collective bargaining agreement arbitrations were heard by 10% of the available arbitrators. R. Smith, L. Merrifield, & T. St. Antoine, LABOR RELATIONS LAW: CASES AND MATERIALS (6th ed. 1979), citing LABOR RELATIONS YEARBOOK--1977, at p. 206 (1978).

[187] *See*, 29 CFR §2200.101(a)(3), .101(d) (1989).

[188] L. Singer, SETTLING DISPUTES 139 (1990, Westview Press).

many cited violations, such as the so-called "egregious" cases. Nowhere do the OSHRC SJ rules absolutely require the SJ to tackle the entire case. The SJ process is not an all-or-nothing concept. In fact, the rules are rather explicit. "The Judge shall confer with the parties on subjects and issues of whole or partial settlement of the case."[189] "The Judge shall seek resolution of as many of the issues in the case as is feasible."[190] As suggested by the Chief ALJ, it is entirely possible that an SJ could take a "slice" of a case and run it through the SJ process, perhaps a "cross-section" of representative violations, which could give the parties an effective preview of key or typical parts of their cases.

In addition, another possibility is indicated by the way in which the parties responded to the problem in the actual case mentioned above, which involved, among other things, so many cited violations that the complaint alone was more than 150 pages long. The parties requested the SJ to continue serving as the ALJ assigned to hear the case. A settlement, albeit at the last minute before hearing, ultimately resulted.

Willingness to Take the Risks.

An employer's attorney interviewed in connection with an SJ case he had handled pinpointed very accurately the core problem and risk in settlement negotiations generally: "No one likes to make the first move." He described his decision to invoke the SJ procedure in the first instance as "a delicate call." This expresses the essence of another important factor, rather intangible and highly personal to the individual attorneys involved--a willingness to take some risks associated with settlements in general, and with the use of the SJ procedure in particular.

No responsible attorney wants to be perceived by the other side as negotiating from a position of weakness. To "make the first move" entails the risk of being perceived as admitting some weakness in one's case. If dealing with a pro se respondent or an attorney with whom they have had no previous contacts, DOL attorneys may have some reservations about taking the settlement initiative. (This concern is not a problem in dealing with attorneys who are familiar with the OSHRC system and know that 90% of the contested cases are settled. The expectation there is one of a negotiated settlement).

However, the DOL attorneys, and private attorneys who work regularly at the OSHA "bar" have a special problem if they invoke the SJ procedures. It must be emphasized that none of the individuals contacted for this study expressed the problem in quite this way, but from the interviews there gradually emerged an impression, a sense of reluctance, to admit that the norm of bi-lateral negotiations had failed. In a system where 90% of the contested cases are negotiated bi-laterally to settlement, invoking the intervention of an SJ borders on appearing to admit that one's own negotiating skills have failed. There may be some reluctance, at a less than fully conscious level, to invoke an exceptional and extraordinary procedure which suggests a departure from the norm.

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[189] 29 CFR §2200.101(b)(1) (1989) (emphasis added).

[190] 29 CFR §2200.101(b)(4) (1989) (emphasis added).

Another problem peculiar to the SJ procedure also could have some impact. Candid disclosures about one's case, including inevitably the disclosure of some elements of one's analysis and strategic thinking, are necessary for effective functioning of the SJ process. But disclosures involve very real risks touching upon delicate considerations of professional responsibility. Although the OSHRC rules on confidentiality of the SJ process mitigate these concerns, no rules can protect completely against the subtle and indirect benefits which a skilled adversary can gain--quite ethically--from the SJ process. The attorney who invokes the SJ procedure must consider the possibility that the SJ will not achieve a settlement and the case will go to trial. The disclosures, and the "preview" on the merits, often so integral and crucial to successful use of the SJ process, can also suggest ways in which the adversary can strengthen his case.

(2). Factors in Successful or Partially Successful Use of SJ Procedures.

The SJ.

The individuals who furnished information for this study, and all other sources of data, confirmed a truism, but it is a truism which was worth confirming. The single most important factor in the SJ process is the SJ. At a common sense level, this is a rather predictable conclusion. After all, if the parties have been unable to achieve settlement among themselves, it simply stands to reason that the outcome of the SJ process hinges on the SJ. But what is it about the SJ that makes for success or lack of success in the process? What qualities and characteristics and actions affect the outcome?

To the extent that there were common denominators among the DOL attorneys who voiced an opinion, it was the importance of the SJ. There were variations on two, sometimes overlapping, themes: (1) the importance of the personality and abilities of the SJ and (2) what the SJ did or should do. In terms of the personality and abilities of the SJ, significant phrases elicited during the interviews included--a skilled negotiator; one who can keep a dialogue going; who can concisely articulate an analysis which is sensible to the parties; a "people person" who has an ability to deal with people; an ability to listen, to get to the heart of the issue, without insulting anyone; an inclination to get involved; ability to establish rapport; candid. In terms of what the SJ did or should do: keep a dialogue going; knowledgeable about the case; getting to the heart of the issue; listening to the parties; not insulting; getting involved and telling the parties how he sees the case; knows the case; establishes rapport; well-prepared; pointing out what he would consider if he were the ALJ; pointing out the strengths and weaknesses of the parties' positions.

The ALJs themselves tended to agree, directly or indirectly, but there was less emphasis on attitude and personality and more emphasis on what the SJs did, or should do. Among the factors the ALJs mentioned directly were the SJ's attitude, an ability to get the parties in the proper frame of mind, getting them in a settlement mode or frame of mind: "salesmanship;" going into the process determined to make it work; setting an agenda; giving the parties goals and homework; keeping their feet to the fire; maintaining the dignity of the proceedings but avoiding rigid formalities. There were also some remarks which indirectly, and probably unintentionally, reflected on the importance of the attitude and techniques of the SJ. Among the ALJs, there was some mention of: (1) the fact that the SJ process could require more time and preparation than some ALJs might want to invest; (2) a concern about proper weight and credit in the ALJ's statistics for handling SJ cases; (3) a summary of the ALJ's procedures as SJ--giving the parties an initial talk, encouraging settlement, or, discussing with them alternatives to settlement, such as delay, costs, and confrontation.

Also, and to put it diplomatically, the opinion did not go unvoiced that the SJ procedure does not add much and was very similar to regular procedures. In a sense, those who indicated such an opinion were not completely off the wall. An ALJ who wants to facilitate and prod parties toward settlement can exert considerable pressure and do a great deal. Inflections of voice, body language, ambiguous remarks, hypotheticals, reminiscences about past cases or cases read, rhetorical questions (are you sure about . . .?), can, up to a point, do some of the things which an SJ would do. However, these are all ambiguous and potentially irritating signals. One virtue of the SJ procedure is that the SJ can go beyond the "up to a point." The SJ has no need to be Delphic, just diplomatic.

There was a consensus, however, on the importance of the SJ's attitude, personality, interpersonal skills, and preparation. This consensus supports the Joseph & Gilbert Report's point that not every ALJ necessarily has the aptitude for, and interest in, being an SJ.[191] The consensus as to the importance of the SJ's preparation, particularly among the attorneys who had appeared before

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[191] Joseph & Gilbert Report at 21.

SJs, does emphasize a factor which may not have received sufficient attention in the past. An SJ has to do enough homework to be familiar with the case and to be credible in the perception of those whose dispute he is essentially mediating. The perception of the parties regarding the SJ's efforts are very important. Again, a recent book on ADR has indicated, anecdotally at least, the importance of this factor. "The parties were impressed by the mediators' willingness to put in long hours in order to learn the necessary terminology."[192] Bluntly put, the SJ who demonstrates lack of preparation communicates an indifferent attitude, and he must be one whale of a skilled negotiator, able to establish rapport by force of personality or otherwise, in order to counteract the parties' impression of his indifference.

Nonetheless, the importance also of the SJ's personality, interpersonal skills, and ability to establish rapport cannot be overestimated. In fact, one of the most interesting aspects of the SJ cases studied involves situations in which the parties requested the SJ to continue as the presiding and deciding ALJ, after the period for completing SJ proceedings had elapsed. (The OSHRC Chief ALJ confirmed that it was not unusual for the parties to request that the SJ stay on the case as the deciding ALJ). Four such cases were indicated by the sources and persons interviewed for this Report. It appears that those cases all ultimately were settled.

Although outside the scope of this Report, such developments (and the ADR experience generally) may call for a reexamination of what makes for a good adjudicator and what conduct by an adjudicator will be acceptable to the parties. The traditional and popular image of the proper judge as a detached, somewhat aloof, Olympian individual who is rigorous in his logic and self-discipline may need to be tempered a bit. Rapport and trust, respect, empathy, an ability to communicate sympathetically, and other virtues may be more important in many contexts than the mechanics of avoiding ex parte contacts and the like.

Closely related to the SJ's personality and preparation is the SJ's basic mindset or judicial philosophy. No particular questions, interviews, or sources of information specifically gave rise to the following observations. However, the cumulative impact of various comments, statements, remarks, and even casual conversations, resulted in the distinct, but subjective, impression that ALJs tend to fall into one of two philosophical camps: (1) those who adhere generally to the more traditional view of the adjudicator as primarily and foremost an umpire, who knows that most cases will settle but realizes the need occasionally to encourage the parties to settle as a matter of case management; and (2) those who adhere to a slightly different model with a somewhat greater emphasis on resolving disputes and managing a caseload effectively. This impression is supported in some degree by remarks of some DOL attorneys, and ALJs, to the effect that they would like to see more ALJs get more involved in the settlement process generally.

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[192] L. Singer, SETTLING DISPUTES 139 (1990, Westview Press).

Although the extent to which the ALJs' view of the ALJ's proper role may be a problem in the SJ process is debatable, one point should be clear. The ALJ's opinions regarding his role in the process are a significant factor or variable in the use of SJ proceedings. An ALJ who is unaccustomed to an active role in the negotiating process, whose prior conditioning and outlook have attuned him to the predominately "umpire" role, will be uncomfortable to a greater or lesser degree when serving in the more activist role of an SJ. Those who enjoy attempting to resolve disputes, who believe that many cases which could go to trial could be otherwise resolved, who believe that ALJs do not always put the case in a settlement posture, will be more comfortable in the SJ role.

Type of Case.

The type of case was another factor explored and mentioned during the interviews. Roughly speaking, the opinions fell into two categories. There were individuals who, based on their experience, expressed views which were quite consistent with the Joseph & Gilbert Report.[193] These viewed the most likely candidates for SJ proceedings to be cases involving: (1) the amount of penalties, (2) the classification of violations (e.g., wilfull v. serious, or serious versus "other"), (3) unsophisticated respondents, (4) no major legal issues, (5) issues which would take a lot of trial time; (6) a large number of violations or issues. They viewed the least likely candidates as: (1) major legal issues, (2) complex facts, (3) cases turning on credibility issues, (4) parties who were not genuinely interested in settlement.

However, a few individuals who had been involved in the SJ process, including the OSHRC Chief ALJ, had a somewhat more expansive view of the potential for SJ proceedings. One DOL attorney concluded that SJ proceedings could, if used properly, be valuable in almost any kind of case, including those with a lot of "knotty" problems, a lot of issues, and even unique or novel issues; the "feeling" was expressed that cases with such issues were of a sort which the parties could "sort through" better with an SJ around a table than by using traditional techniques. An ALJ believed that most, or a large percentage, of cases could lend themselves to successful use of SJs. Likewise, the Chief ALJ, from his perspective of having seen reports from all SJs, expressed the view that SJs could be effective in complex cases involving arcane subjects or even a new standard.

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[193] *See*, Joseph & Gilbert Report, at 39-40.

The number of actual cases on which there was enough data to venture an analysis was small. Therefore, any conclusions must be very guarded. However, for cases where fairly definite information was available, some of the most successful did involve a relatively limited range of fact-oriented issues and matters of applying a substantive regulation to the particular facts of the case, in particular, two trenching cases described elsewhere in this Report. Others involved essentially the amount of penalty or disputed matters which, to the extent that they were recalled, did not seem to involve policy, precedent-setting issues, or particularly complex, arcane subject matter. Nevertheless, there were also some issues, in some cases, which involved: (1) highly technical aspects of the employer's operation; (2) special technical expertise and expert witnesses; or (3) a relatively new standard.

Accordingly, opinions and cases on which information was available indicate that the SJ procedure works well, all other factors being equal, in cases presenting factual issues of limited precedential value, particularly issues which can be described as involving the application of law (or regulations) to the particular facts of the case. However, the available information and opinions indicate that the type of case (in the sense of the type of issues, e.g.,, legal and policy versus factual) is not a factor which would outweigh or overwhelm other variables, notably the ability and effort of the SJ, and, to be discussed below, the parties themselves.

Upon reviewing the information received from various individuals during the course of this study, a few miscellaneous but interesting points emerge. First, in terms of the time and additional number of SJ cases which the ALJs believed they could handle without cutting into their regular cases, ALJs who had served as SJs varied considerably in their responses. One did not offer a precise figure, but indicated that some SJ proceedings need not be particularly time consuming, while others, handled properly, might require more time than some ALJs might want to invest. Another, whose service as SJ in one case had involved primarily a one-hour or so conference, concluded, of course, that a significant number of cases could be handled in this way without risking serious inroads on the time available for other cases. Another indicated that, in light of the currently increasing caseload, more SJ proceedings would make greater inroads than in the past on time available for other cases. Another estimated a capacity to absorb possibly 10 SJ cases under the current workload. On balance, and discounting for the fortunate ALJ whose SJ proceedings had taken only about an hour, the capacity of the present number of ALJs (@18, 2 of whom are committed to a large proportion of administrative duties as Chief ALJ and Deputy Chief ALJ) to absorb a significant number of SJ proceedings without detriment to their other cases would seem to be limited.

Second, of those ALJs who had served as SJs and therefore had a touchstone for comparison, two of those who were most positive in their attitude toward SJ procedures also indicated that there had been cases which they had handled during the last two years which could have benefitted from the use of an SJ. One stated, "yes, especially after three or four hours [of hearing] the case." Another stated that the SJ process could be beneficial in a number of cases, but a great deal depended on the lawyers. Others were more or less negative, or voiced no opinion.

The Parties.

As indicated generally by the Joseph & Gilbert Report, no true settlement technique can be imposed successfully on parties who are completely against settlement. By giving each party an absolute "veto" power, the rules governing SJ procedures contemplate parties who have, at least, not entirely rejected the possibility of settlement. This brings into play the factor or variable of the parties themselves.

Among those interviewed, the factor of the parties' attitude and approach did not go unremarked. Both an ALJ and a DOL attorney indicated affirmatively that the kind of case in which the SJ procedure would be least likely to succeed was one in which one or both parties were not using the proceedings properly or in good faith. Others made a similar point indirectly, commenting for instance on the importance of the parties' cooperation generally, or in a particular case, in the outcome of SJ proceedings.

As with ALJs, there are among litigators (and parties) a range of temperaments and outlooks. Although it is probably more accurate to speak in terms of extremes along a spectrum of possibilities, it is convenient (and accurate enough) to conclude simplistically that some are more settlement-prone than others. Of course, a party's position in a particular case may be dictated by external forces, the demands of the situation or policy considerations. But over the long term, the more an attorney actively enjoys the professional challenge of settling a case and resolving a dispute, the more likely he is to be a positive factor in successfully using the SJ procedures. The more combative, aggressive, adversarial, and prone to a win-lose outlook on his cases, the less likely he is to be a positive factor in the SJ procedures.

All lawyers regularly involved in practice before the OSHRC, of course, are oriented to the norm of settlement. But attitude and personal philosophy can make a difference in successful use of SJ procedures. At one extreme, the attorney who approaches every case with the sincere attitude of "how can we resolve this case," keeping in mind the goal of protecting peoples' lives and health, and who believes that virtually all cases potentially can be settled, stakes out a kind of "high ground." It is more difficult to be adversarial and stubborn in the face of such a position. An impasse, if one occurs, is more likely to be the result of good faith differences which can benefit from mediation, rather than the result of stubborn adherence to a hardened adversary position in the face of equal stubborness from the adversary.

4. Summary

Overall, the OSHRC experience with SJs confirms several basic points, conclusions, and recommendations of the Joseph & Gilbert Report. The SJ procedures are a valuable adjunct which, when properly used, can facilitate settlements and achieve settlement in cases which would be likely otherwise to go to hearing. The "preview" aspect of SJ proceedings seems to be particularly effective and dramatic in its impact on the parties.

A most interesting development has been the emergence of cases in which SJ proceedings did not result in immediate settlement, but may have facilitated eventual settlement, particularly in cases involving numerous violations. In hindsight, this seems to be a natural offshoot of the SJ process. Perhaps the SJ has sometimes "thawed" the settlement "ice," rather than "broken" it. Of course, no one can say with any degree of certainty, that a particular case would have settled anyway without the mediation and intercession of an SJ. However, there is considerable significance in the fact that the parties themselves sometimes have requested the SJ to continue as the deciding ALJ in the case, and that all of those cases were recalled as having been settled. Some kind of chemistry was at work in those cases. Although the OSHRC SJ rules provided for the parties to make such a request, it was apparently not foreseen that it would be invoked very often. The Chief ALJ described this development as "surprising."

Not quite as surprising was the infrequency with which the SJ procedure has been invoked. In terms of absolute numbers, SJs should be seldom used. The whole idea behind the SJ procedure is its extraordinary, exceptional nature. It supplements, rather than displaces, the parties' settlement negotiations. Used too often, it would reach very quickly a point of diminishing returns. In the context of OSHRC litigation, with a track record of a 90% settlement rate, the absolute number of SJ cases should be modest. This fact does not detract from the importance of the availability of the SJ procedure, however.

If anything, there is some slight risk that encouragement of ADR and SJ proceedings could go too far in the other direction. Both in terms of the capacity of the limited number of OSHRC ALJs to absorb additional workload, in the face of a generally rising number of contested cases, and in terms of disappointed expectations, too many SJ proceedings could be worse than too few. Unless the SJ is requested to continue as the deciding ALJ, every SJ proceeding means that two ALJs, rather than one, have been committed to the case. A point of diminishing returns could be reached quite quickly if the SJ proceedings are not successful. And it would only take a few unsuccessful SJ proceedings to solidify and increase the perception of the SJs as not adding very much to the process.

At any rate, there are certain factors and variables which seem significant in a party's threshold decision to invoke the SJ proceedings. First, and most simple, a party must know that the procedure exists. Second, but not quite so obvious, a party must be alert to the possibility of using the SJ procedures, and have a solid understanding of how the SJ differs from the ALJ in terms of powers and authority. Third, and closely related, a party must have confidence in the SJ procedure.

Successful use of the SJ procedure hinges primarily upon the SJ, assuming that the parties are proceeding in good faith, have reached some impasse and are genuinely interested in resolving the dispute short of full litigation. (It should be emphasized that this latter qualification is not phrased in terms of the parties' being interested merely in achieving a settlement. Aside from a few warped individuals who are obsessive-compulsive exhibitionists, lawyers and clients prefer settlement over the hazards and stress of a courtroom. But they prefer to get settlements on their own terms, thinking of settlements in terms of what they get, rather than what they might have to give). The process stands or falls, on the SJ's attitude, skills, preparation as a mediator, and his use of the additional tools available to an SJ.

While it is a significant variable, the type of case is not as important as the SJ and the parties. Again, this seems to be indicated by the fact that parties not uncommonly request the SJ to continue as the deciding ALJ in the case, and eventually settle.

5. Impediments to the Effective Use of SJs.

The main impediments to the effective use of SJs can be summarized as follows: (1) among those who do not regularly handle OSHA cases, simple lack of knowledge that SJ procedures exist; (2) among those who regularly handle OSHA cases, a tendency to be insufficiently alert to the possibilities of using an SJ because it is an extraordinary procedure intended for exceptional situations ("out of sight, out of mind"); (3) its operation in a system where 90% of the cases are settled anyway; (4) a partially accurate, but misleading, perception that the ability of an SJ to facilitate settlement is not dramatically greater than that of an ALJ, which is symptomatic of an insufficient understanding or appreciation of the difference between SJs and regular ALJs, particularly the additional powers and authority of an SJ.

C. OSHRC Simplified Proceedings

1. Contrast to SJ Procedures and Summary of OSHRC Simplified Proceedings

In contrast to the SJ procedures, OSHRC's simplified proceedings are a very different kind of ADR mechanism. The use of a SJ temporarily removes the case from the litigation mainstream, for intensive mediation efforts by a specially assigned ALJ. A party participating in the SJ procedure surrenders virtually no procedural rights, and the SJ procedure does not alter the rest of the litigation process. Simplified proceedings, however, involve the waiver of potentially important rights and can modify significantly the litigation process itself.

The essence of an OSHRC simplified proceedings case lies in what it eliminates--what it does not allow or require the parties to do. There are no pleadings--no complaint or answer.[194] The only documents initially informing the parties of each other's positions are the citation (which may contain little more than a close paraphrase of the standards allegedly violated) and the respondent's notice of contest (which may be a simple blanket statement contesting all citations and proposed penalties). Pretrial discovery is not allowed, except by order of the ALJ.[195] OSHRC's policy guidance to its ALJs on discovery is fairly clear. The "Purpose" section of the OSHRC simplified proceedings rules states: "Discovery is generally not permitted."[196] This limitation goes beyond discountenancing complicated and time-consuming depositions. Requests for admissions or production of documents, and even relatively simple interrogatories, are discouraged if not largely precluded under the simplified proceedings rules. Pretrial motions are likewise discouraged,[197] and interlocutory appeals of an ALJ's rulings are not permitted.[198] If the case actually goes to hearing, the Federal Rules of Evidence do not apply.[199] Although the OSHRC Rules allow discontinuance of simplified proceedings, and resumption of conventional proceedings, a showing of "sufficient reason" is required, in the absence of consent by all parties.[200]

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[194] 29 CFR §2200.205 (1989).

[195] 29 CFR §2200.210 (1989).

[196] 29 CFR §2200.200 (1989).

[197] 29 CFR §2200.205(b) (1989).

[198] 29 CFR §2200.211 (1989).

[199] 29 CFR §2200.207(c)(1) (1989).

[200] 29 CFR §2200.204 (1989).

In lieu of pretrial discovery, the parties are supposed to engage in discussions to address settlement, narrowing of issues, an agreed statement of issues and facts, any defenses, witnesses, exhibits, motions, "and any other pertinent matter."[201] These unstructured discussions are supposed to occur within a reasonable time before a "conference/hearing,"[202] which is, as its name implies, a hybrid proceeding divided into two phases--a conference, and then a hearing, which the OSHRC rules indicate are normally to be scheduled to occur on the same day.[203]

However, there are some categories of cases which are not eligible for simplified proceedings. This is consistent with OSHRC's long-standing recognition that simplified proceedings are appropriate only in less complex, and relatively simple, cases.[204] Viewing certain generic types of cases as inherently involving potential for considerable complexity, OSHRC has made cases arising under section 5(a)(1) of the Act (general duty clause) and various "health" standards ineligible for simplified proceedings.[205]

For cases involving all other standards, the rules draw no lines based on complexity, or the need for discovery, or anything else related to the facts and issues of the case. Any party may request simplified proceedings by simple written communication. "I request simplified proceedings" would be sufficient. But this request must be filed within 10 days after notice of docketing is received.[206] A copy of the request also must be sent to the other parties, because any other party (i.e.,, usually the Secretary of Labor) may veto simplified proceedings by responding with (and serving on the other parties) a written objection, within 15 days after the request is served.[207] An objecting party need not give any reason for the veto; a simple "'I object to simplified procedings' will suffice."[208]

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[201] 29 CFR §2200.206 (1989).

[202] Id.

[203] 29 CFR §2200.207 (1989). In OSHRC's explanation of its amendments to rules for simplified proceedings in 1982, it stated, "[T]he Commission intends that the conference and hearing not be separated without good reason and that in most cases hearings will continue to be held at the conclusion of the conference." 47 FR 29525, 29527 (July 7, 1982).

[204] See, Notice of Proposed Rulemaking, 44 FR 70106, 70109 (December 5, 1979); A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 14-17 (OSHRC, Rev. Nov. 1988).

[205] 29 CFR §2200.202 (1989) (e.g., alleged violations of standards at 29 CFR §1910.94 (ventilation), §1910.95 (occupational noise, §1910.96 (ionizing radiation), Subpart Z of §1910 (toxic and hazardous substances)).

[206] 29 CFR §2200.203(a)(1), (2) (1989).

[207] 29 CFR §2200.203(b)(1),(2) (1989) (emphasis added). However, this does not mean 15 working days. Under OSHRC rules regarding computation of time, intervening Saturdays, Sundays, and federal holidays are excluded from the computation of the time limit only if the period is less than 11 days. 29 CFR §2200.4 (a) (1989). Therefore, the actual time in which to respond to a request for simplified proceedings would be less than 15 normal working days.

The request for simplified proceedings, and any veto, must therefore be made very early in the case. As will be discussed later,[209] this time factor has significant implications for the use of simplified proceedings. Basically, however, the decision to request or object must be made at a time when the parties have the least information and are least able to assess the potential complexity of the case as it might later develop.

2. Background and Context

As early as 1973, OSHRC Commissioner Timothy Cleary had suggested that informal proceedings be made available in OSHRC adjudications.[210] Commissioner Cleary seemed to have in mind the situation of the pro se employer and employee representative. He expressed concern because "formal hearings . . . sometimes present complex procedural issues that are bewildering to a layman not represented by counsel. This real possibility may make contesting employers and employees reluctant to exercise their statutory rights, and thus, in effect, deny them their "'day in court.'"[211] He also suggested "that there are many situations, particularly when violations that are not serious are involved," where the parties would "prefer an informal conference-type proceeding."[212] Recognizing that adjudication is adversary in character, Commissioner Cleary also voiced hope that informal proceedings would reduce the antagonism that often accompanies formal adversary proceedings.[213]

Commissioner Cleary's views are set out in some detail because they provide something of a contrast to the reasons given for establishing simplified proceedings in OSHRC's original notice of proposed rulemaking in 1978. As described in the explanatory materials for the notice of proposed rulemaking:

> The purpose of these proposed simplified rules is to eliminate unnecessary paperwork, reduce expenses to the parties and the Agency, and make Commission adjudication less complex and time-consuming. It is hoped that the procedure is simple enough so that parties need not necessarily retain legal

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[208] 29 CFR 2200.203(b)(3).

[209] See text at notes 291-93.

[210] Cleary, Pleading and Practice Before the Occupational Safety and Health Review Commission, 24 LAB. L. J. 779, 787 (1973).

[211] Id.

[212] Id.

[213] Id.

> counsel to guide them through what might appear to be complex procedural rules. The Commission looks upon the rules . . . as experimental.[214]

As finally published, the "purpose" described in the regulation itself was "to provide simplified procedures for resolving contests . . . so that parties before the Commission may save time and expense while preserving fundamental procedural fairness. The rules shall be construed and applied to accomplish these ends."[215]

Author Cleary's common sense, human concerns have a somewhat different focus than the Federal Register's pedestrian recital of vague economic considerations. To take a phrase from today's vocabulary, the formal rulemaking emphasized "transaction costs," rather than the human element and the possibilities for tempering the adversariness of the litigation process.

At any rate, the basic concept of simplified proceedings was hardly controversial. Putting the concept in more concrete form, however, did generate some controversy. Various commentors expressed misgivings[216] about the proposed rule, which contained many features of the present simplified proceedings, e.g., elimination of pleadings, restrictions on discovery, and the ineligibility of cases arising under the general duty clause and various health standards.[217] (As one justification for eliminating pleadings, OSHRC noted that the complaint, under then-prevailing rules of pleading, alleged little more than what was set out in the original citation.[218]) However, the only parties who could invoke simplified proceedings would have been parties who filed notice of contest, thereby excluding the Secretary of Labor. Also, under the proposal "other parties" (usually the Secretary of Labor) could not object to the use of simplified proceedings.[219]

In response to comments received during the rulemaking process, OSHRC established the present procedure for vetoing the use of simplified proceedings.[220] Moreover, because of various concerns raised in the comments, OSHRC adopted the rules on an experimental basis, for a period of one year, a period for evaluation.[221]

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[214] 43 FR 36855 (August 18, 1978).

[215] 44 FR 70112 (December 5, 1979), codified at 29 CFR §2200.200 (1989) (emphasis added).

[216] For example, some doubted that the proposed rule would achieve the stated goals. Others voiced concern about the impact of the rules, as proposed, on a party's rights. 44 FR 70108 (December 5, 1979). (Explanation of final action adopting rules.)

[217] 43 FR 36855-56 (August 18, 1978).

[218] Id. at 36856.

[219] Id.

[220] 44 FR 70109 (December 5, 1979).

The experimental period bore mixed results. During the first three months, requests for simplified proceedings were filed in 262 cases, about 22% of the incoming cases. All but one of the requests came from respondents. Department of Labor attorneys vetoed 101 of the requests,[222] about 38.6%. Of the remaining 161 which were not vetoed by the Department of Labor, OSHRC granted 105 requests. Those denied by OSHRC itself involved ineligible types of cases, late filings, or other reasons.[223] OSHRC officials voiced concern over what they perceived as a low volume of requests.[224]

During OSHRC's experimental period, another development reduced further the number of contested cases where simplified proceedings otherwise might have been invoked. In September 1980, the Department of Labor authorized OSHA Area Directors to enter into informal settlement agreements, prior to notice of contest being filed.[225] By November 1980, the average number of contested cases docketed at OSHRC had dropped to 60 per week, compared to 160 per week prior to November.[226] According to a GAO report, 11,841 cited violations were settled at the Area Director level during fiscal year 1981, some 10.6% of the total number of violations cited by OSHA.[227] (However, as the GAO Report also indicated, most of these settlements involved lowering the civil penalty. Of the 150 files reviewed by GAO, OSHA Area Directors downgraded the classification of the violation in less than 3% of the cases and dropped a charged violation in less than 2% of the cases.[228])

During 1981, an article marking the tenth anniversary of the OSH Act asserted: "While at one time simplified proceedings may have alleviated the burden placed on employers cited for relatively trivial matters, OSHA enforcement and adjudication is now increasingly technical and complex. In short, simplified proceedings is an idea whose time has come--and gone."[229]

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[221] Id.

[222] [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 200 (July 17, 1980).

[223] Rothstein, OSHA After Ten Years: A Review and Some Proposed Reforms, 34 VAND. L. REV. 71, 122, n. 330 (1981)(citing [1980] EMPL. SAFETY & HEALTH GUIDE (CCH) No. 480, at 11).

[224] [1980] 10 OCCUP. SAFETY & HEALTH REP. 200 (BNA) (JULY 17, 1980).

[225] [1980] 10 OCCUP. SAFETY & HEALTH REP. 533 (Oct. 16, 1980). See also, text at notes 130-34.

[226] [1981] OSHA COMPLIANCE GUIDE (CCH) 10,190 (p.7801) (April, 1981).

[227] INFORMAL SETTLEMENT OF OSHA CITATIONS: COMMENTS ON THE LEGAL BASIS AND OTHER SELECTED ISSUES (Report to the Chairman, Subcommittee on Manpower and Housing, Committee on Government Operations, House of Representatives), GAO/HRD-85-11 (Oct. 26, 1984), at p. 12.

[228] Id. at 13.

The author's announcement of simplified proceedings' demise was premature. Enforcement and adjudication certainly had become more technical and complex, as a general matter. Nevertheless, a residuum of less complex cases would remain, and not all of these could be expected to settle informally at the Area Director level.

As part of its evaluation of the experimental period, OSHRC requested comments on the actual operation of the rules. Among other things, OSHRC expressed particular interest in comments regarding: (1) expansion of the "ineligible" list, and (2) the elimination of a party's power to veto a request for simplified proceedings.[230] "Virtually all of the comments opposed the elimination of a party's right to object to simplified proceedings."[231] As far as adding more standards to the ineligible list was concerned, the comments suggested there was no need to enlarge the list, "as long as parties retain the right to object to simplified proceedings."[232] OSHRC agreed, and the final rules were essentially the same as the rules governing simplified proceedings today.

However, it must be emphasized again that the OSHRC simplified proceedings do not exist in a vacuum. In order to understand the consequences and implications today of invoking, and agreeing to, simplified proceedings, one must contrast the situation in 1982 with the situation which later developed.

In 1982, a party who invoked or agreed to simplified proceedings surrendered few meaningful procedural rights. As OSHRC itself had indicated, the Secretary of Labor's complaint alleged "little more than what is set forth in the citation. Answers usually deny the substantive portions of the complaint."[233] Therefore, in 1982, eliminating the pleadings was a minor matter.

As far as discovery was concerned, OSHRC's general procedural rules in 1982 allowed interrogatories and depositions pursuant only to a special order from the ALJ,[234] although requests for admissions could be made without special order.[235] Therefore, limiting discovery affected only requests for admissions, since special orders were required already for other forms of discovery.

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[229] Rothstein, OSHA After Ten Years: A Review and Some Proposed Reforms, 34 VAND. L. REV. 71, 122 (1981).

[230] 46 FR 51933, 51934 (October 23, 1981).

[231] 47 FR 29526 (July 7, 1982). (Amendment of rules for simplified proceedings.)

[232] Id.

[233] 43 FR 36856 (August 18,1978).

[234] M. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §374 (West, 2d ed). (1983).

However, the larger context in which simplified proceedings operate changed significantly in 1986, when OSHRC thoroughly revised its procedural rules regarding all cases other than simplified proceedings.[236] In relation to discovery, as one text-writer put it, "After 15 years of discouraging discovery, the 1986 revisions of the Commission's Rules of Procedure specifically authorize a wide range of discovery."[237] As OSHRC put it, a "mix" was authorized, "depositions permissible only by agreement between the parties or with the approval of the Commission or the Judge; 25 requests for admissions and 25 interrogatories permissible without approval; and all other forms of discovery permissible without approval."[238]

Likewise, the rules governing pleadings changed considerably in 1986. Explaining the changes, OSHRC stated: "The new rules impose strict requirements on pleadings, particularly complaints."[239] OSHRC shifted from generalized "notice" pleading (which permits vague, conclusionary assertions in the pleadings) to "a hybrid rule that requires specific pleading of the factual bases of some elements of an alleged violation. . . ,"[240] specifically, the factual bases for allegations: (1) that the cited standard applies to the workplace conditions; (2) that the employer failed to comply with the standards or the general duty clause; and (3) regarding employee exposure to violative conditions.[241] Also, more stringent requirements were imposed on the answer by requiring allegations of facts which serve as the basis of affirmative defenses.[242] OSHRC's justification for the new pleading requirements was summed up as follows:

> [B]ecause the present rules do not demand more detail than the citation contains, the Solicitor's Office generally files a standardized complaint. As a result . . . problems with the Secretary's case that could be discovered and corrected at an

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[235] Id., at §373.

[236] 51 FR 23184, 23194 (June 25, 1986)(Notice of Proposed Rule).

[237] M. Rothstein, supra note 234, at §371.5 (pocket part, 1989).

[238] 51 FR 32009 (September 8, 1986).

[239] 51 FR 32006 (September 8, 1986).

[240] Id.

[241] Id. at 32007; codified at 29 CFR §2200.35 (1989).

[242] Id. at 32008; codified at 29 CFR §2200.36 (1989). The new hybrid fact-pleading requirements, whether intentionally or not, also serve indirectly to enhance settlement and ADR. For discussion of a study noting the possibility that "notice-pleading" contributes to inefficient dispute resolution, see above, text at notes 73-75.

> early stage are frequently overlooked and the proceedings are unnecessarily prolonged. And because the typical answer broadly denies the only substantive allegation of the complaint--that violations occurred as described in the citation--the pleadings do not narrow the issues significantly. The Commission therefore cannot rely on the notice pleadings of the federal rules to accomplish in its proceedings the function of defining and narrowing issues.[243]

In short, the potential consequences of requesting and agreeing to simplified proceedings changed in 1986. Today, a party requesting or agreeing to simplified proceedings gives up at least two potentially significant benefits of conventional procedures: (1) pleadings which provide at least some factual information about the other party's version of the case; and (2) pretrial discovery as a matter of right. Moreover, simplified proceedings now lose the "early focus" and early narrowing of issues which can be gained by fact-oriented pleadings at the outset of the case.

In order to have an adequate perspective on the context in which simplified proceedings operate, two other significant background components must be considered. The first involves OSHRC's proposed rulemaking in 1987 to amend the rules governing simplified proceedings, and the comments received in response to that proposal. The second involves further consideration of such mundane, but crucial, matters as the burden of proof and affirmative defenses, which apply with equal force in both simplified proceedings and conventional litigation.

1987 Proposed Rulemaking on Simplified Proceedings

During the rulemaking which led to major revisions of OSHRC's procedures in 1986, OSHRC had deferred considering any changes to simplified proceedings.[244] It returned to this subject in 1987. The major thrust of the proposed amendments was to remove the Secretary of Labor's absolute veto power over requests for simplified proceedings. (In addition, the proposal also would have: (1) allowed late filing of a simplified proceedings request upon a showing of good cause; (2) reduced the time period for objection to ten days; and (3) made general duty clause cases eligible for simplified proceedings.[245])

The proposed rule did not mention the Secretary of Labor by name. "The most significant changes would strengthen the role of the Commission when the parties cannot agree on whether to use simplified proceedings or conventional proceedings in trying a case."[246] The same special committee, composed solely of OSHRC officials and ALJs, which had conducted the study underpinning the 1986 rules changes[247] also had reported that where simplified proceedings had been used, "they had worked well. The Committee noted, however, that simplified proceedings were sparingly used, largely because of the widespread use of the absolute veto . . . ." [248] The committee also had recommended a change in the rules which would give the Commission and its Judges "'the final word on whether the rules should be utilized in a particular case after an election is made by one of the parties.'"[249] OSHRC agreed: "The Commission's experience under its existing procedural rules has revealed that simplified proceedings are underutilized, primarily because the present rules give any party a veto over the use of simplified proceedings."[250]

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[243] 51 FR 32007 (July 7, 1986) (emphasis added).

[244] See, 52 FR 4917 (February 18, 1987). (Notice of Proposed Rulemaking on simplified proceedings.)

[245] Id. at 4918.

Objections to a request for simplified proceedings would have been resolved by the Chief Administrative Law Judge or the Judge to whom the case had been assigned.[251] However, the proposed "test" governing the Judges' discretion had nothing much to do with the complexity or difficulty of the case. Instead, a standard based on the rather vague contours of "due process" was proposed. "If the objecting party shows that, under the circumstances of the case, simplified proceedings would deny due process to the objecting party, the Judge shall order that the case be conducted under conventional rules."[252] The proposed rule constantly orbited around "due process." For instance: "Proposed paragraphs (b)(3) and (d) of §2200.203 and proposed paragraphs (a) and (b) of §2200.204 state a single criterion for parties and judges to apply when a party objects . . .: that simplified proceedings would, 'under the particular circumstances of the case,' deny due process."[253]

The only mention of complexity or the substance of cases tried under simplified proceedings appears to have been in connection with the proposal's treatment of the categorical exclusions. The ineligibility of health standards cases essentially would have been unchanged, "because of the potential complexity of the legal issues that are presumed to be involved."[254] General duty clause cases would have become eligible for simplified proceedings because "[w]hile some 5(a)(1) cases are extremely complex and difficult to resolve, others are relatively simple and well-suited to hearing under simplified proceedings."[255]

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[246] Id. (emphasis added.)

[247] Id. The Committee apparently consisted of two OSHRC ALJs, the OSHRC General Counsel, Deputy General Counsel, and Executive Director. 51 FR 23184 (June 25, 1986).

[248] Id.

[249] Id.

[250] Id.

[251] Id. at 4917.

[252] Id. at 4920 (emphasis added).

[253] Id. at 4918.

[254] Id.

The Department of Labor, and some representatives of employers, responded with negative comments.[256] An Assistant Counsel for a corporation responded, among other things: [T]he proposed amendments create a 'Catch-22' situation: At the outset of the case, without the benefit of fact pleadings and discovery to determine the complexity and nature of the issues, let alone to learn what facts and issues may be in dispute, the objecting party is required to justify . . . why he will need the safeguards of fact pleadings, discovery, and the Rules of Evidence."[257]

The Department of Labor's comments were extensive and highly critical of the proposed rule. They are also very relevant to this Report because they indicate the prosecutorial arm's perceptions, which affect the use of simplified proceedings, and perhaps help to explain the frequent veto of requests for simplified proceedings.

OSHRC's seeming reticence about explicitly mentioning the Secretary of Labor in its proposal did not go unnoted. "Although the Commission's proposal does not so state, we believe there can be little doubt but that it is employers who most frequently request simplified proceedings, and the Secretary who most frequently opposes their use."[258] The Deparment of Labor comments went on:

> The reason for this pattern is simple and straightforward. The Secretary, as more fully discussed below, bears the initial burden of establishing all of the elements of a prima facie violation. He must also be prepared to rebut an employer's affirmative defenses, the burden of proof of which, under evolving case law, is becoming easier and easier for employers to meet.[259]

DOL's comments and discussion of the relevant case law are too extensive for detailed treatment here. However, the comments specifically mentioned

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[255] Id.

[256] [1987] 16 OCCUP. SAFETY & HEALTH REP. (BNA) 1222 (April 15, 1987). One industry association, the Eastern Contractors Association, supported the proposal. Id.

[257] Letter dated April 2, 1987, to General Counsel, OSHRC, from Lynn E. Pollan, Assistant Counsel, Bunge Corporation, at p. 3.

[258] Letter from Solicitor of Labor, dated April 3, 1987, communicating Department of Labor Comments to General Counsel, OSHRC, p. 1.

[259] Id.

(with citation to cases) the frequent need for answer and discovery in litigation before OSHRC when there were issues such as: (1) employer knowledge, (2) unpreventable employee misconduct, (3) the adequacy of employee training, employer instructions or supervision of employees, (4) economic and technological feasibility of compliance, (5) customary practice in the industry (e.g.,, personal protective equipment standards), and (6) in general duty clause cases, recognition in the industry of the hazard, as well as feasibility and likely utility of specific abatement measures.[260] The Department of Labor comments made a counter-proposal, suggesting a possibility that simplified proceedings might be accorded as a matter of right: (1) in cases where only the amount of proposed penalty was at issue; (2) in cases where the only issue is whether the employer's conduct constituted a violation as alleged in the citation; and (3) where the employer stipulated, among other things, to coverage, Commission jurisdiction, actual or constructive knowledge of its supervisory employees regarding the condition allegedly violating the Act, and that it has no affirmative defenses.[261]

OSHRC has taken no further action on the proposal. However, the proposed rulemaking may have left behind an unfortunate legacy. A year earlier, OSHRC rulemaking had imposed new, rather detailed, hybrid fact-pleading requirements. OSHRC had justified those requirements, at least in part, by criticisms that mere notice pleading had contributed to defective case preparation and the failure of the Department of Labor to discover and correct problems at an early stage of the case.[262] Coming hard on the heels of new requirements for hybrid-fact pleading, the 1987 proposal may have seemed, at best, inconsistent. The same Department of Labor attorneys who, under the regime of mere notice pleading, had not discovered and corrected problems in the early stages of a case would handle more simplified proceedings, where there were no pleadings at all and no discovery as a matter of right. For an unpredictable, but certainly substantial, number of cases, OSHRC proposed to discard the new fact-pleading requirements in what appeared to be at least a partial about-face. It proposed a virtual right to simplified proceedings upon request, without much apparent regard for: (1) the actual complexity of a case; (2) the actual suitability of a case for handling under simplified proceedings; (3) the need for early development and narrowing of the issues; (4) whether a respondent (usually an employer) was appearing pro se or represented by counsel; (5) the anomaly of proposing a legalistic "due process" "test" for denying objections, especially the government's objections, to simplified proceedings; (6) the obvious redundance of a "due process" standard in light of

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[260] Id. at 6-7.

[261] Id. at 9-10.

[262] 51 FR 32007 (July 7, 1986).

OSHRC's already-existing constitutional duty to afford due process; (7) the vague countours of the prevailing principles for determining "what process is due;"[263] (8) the appearance of extreme one-sidedness in the proposal; and (9) the government's burden of proof and its ability to meet affirmative defenses.

In hindsight, the rule as proposed was unlikely to elicit cooperation. Of course, it was only a proposal. Unfortunately, notice-and-comment rulemaking by its very nature can lead to misperceptions and misunderstandings. There is only a published proposal and an invitation to comment, in writing.[264] Under pure notice and comment rulemaking, there is no opportunity for face-to-face discussions around a table. There is only paperwork. There is no opportunity to clarify one's intentions or to dispel misunderstandings.

OSHRC's proposal may well be a concrete example of this generic problem with notice-and-comment rulemaking. As one writer has observed, "Today's rulemaking process often encourages parties to dig in and take extreme positions, and provides little chance for accommodating conflicting interests."[265] So, when OSHRC's explanatory statement referred to how the proposed rule "would strengthen the role of the Commission,"[266] and how the proposed rule was based on an internal OSHRC Committee's recommendation to give the Commission "'the final word . . .,"[267] the institution which is the actual, but unnamed, target of the rulemaking might react negatively.

Along the same lines, the proposed use of a "due process" touchstone for denying objections to simplified proceedings may well have been intended only to stimulate comments. But it also was a proposal to go from one extreme to another, from absolute veto to near-absolute right to simplified proceedings, tempered only by a "due process" standard, in any eligible case. It might even have appeared to contain the potential for seriously hampering the prosecutorial arm in a great number of cases where information and documents were under the control of an adverse party who was alert to the benefits of invoking proceedings which minimize pretrial disclosure. At any rate, from the standpoint of the prosecutorial arm, the proposal undoubtedly appeared to offer nothing positive.

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[263] Mathews v. Eldridge, 424 U.S. 375 (1976) (three-part test: consider (1) the private interest which will be affected by the governmental action; (2) the risk of erroneous deprivation of the private interest under the procedures used and the probable value of additional or substitute procedural safeguards; (3) the governmental interest involved).

[264] See, 5 U.S.C. §553 (1988).

[265] Pou, Federal Agency Use of "ADR": The Experience to Date, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 264 (E. Fine, ed., CPR Legal Program, 1988), also printed in ADR SOURCEBOOK 107.

[266] 52 FR 4918 (Feb. 18, 1987) (Notice of proposed rulemaking on simplified proceedings).

[267] Id.

It should be emphasized, however, that neither the Department of Labor comments, nor anyone interviewed by the author of this Report, expressly stated views identical to those in the paragraphs immediately above. Still, the tenor of the Department of Labor comments was strongly critical, and in some places hostile. "The proposed rules for simplified proceedings cannot be viewed in a vacuum but must be evaluated in light of the pronounced tendency of the Commission to affirm citations only upon employer admissions or the clearest, most unequivocal factual showings."[268]

Whether the comments accurately described OSHRC's "tendency" is largely immaterial. The expressed perception, however, does matter. Given the expressed perception that OSHRC demands strong evidence, those responsible for setting litigation policy in the prosecutorial arm are unlikely to encourage the use of any procedure which dilutes the power to obtain evidence. Likewise, any receptivity to altering the status quo, which might have been latent in the prosecutorial arm, was not encouraged by the nature of the proposal. The proposal, and its timing, were not likely to incline anyone in the prosecutorial arm toward considering the potential value of greater use of simplified proceedings. In a phrase, the proposal seems to have been all stick and no carrot.

Burden of Proof and Affirmative Defenses

As a final background element, a return to the government's burden of proof and the employer's affirmative defenses is in order. A summary overview of these subjects appears earlier in this Report.[269] As that overview indicates, proof of an alleged violation often depends on an almost indeterminate number of variables. Proving a violation, or rebutting an affirmative defense, often depends on much more than simply eliciting testimony from a compliance officer regarding tangible, observed conditions subject to yardstick measurements.

One important variable is the cited standard itself. There are literally volumes of standards in the Code of Federal Regulations. Many of these standards have an open-ended aspect to them.[270] Others call for information or documents in the possession of the employer.[271]

Another important variable is the facts in a given case. In cases involving occupational safety and health standards, the Secretary's burden of proof often hinges on establishing potential employee exposure and actual or constructive knowledge of the conditions. Appendix A, a chart summarizing about 40 reported Simplified Proceedings cases, indicates the vicissitudes of proof and the variables in facts which may be encountered even in a "simple" case. (The addition of "general duty clause" cases to those eligible for simplified proceedings would introduce even more variables concerning the "recognition" of the hazard, the likelihood of death or serious physical harm, and the existence or not of specific feasible abatement measures.[272])

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[268] DOL comments, p. 6, n. 4.

[269] See text at notes 79-90.

[270] See text at notes 53-58.

[271] See text at notes 59, 80-83.

Affirmative defenses introduce another order of variables. The potential substantive defenses which could be raised are virtually unlimited.[273] OSHRC's own rules do not purport to exhaust the possibilities, at least at the pleadings stage. The rule states: "Such matters [affirmative defenses and matters in avoidance] include, but are not limited to the following: creation of a greater hazard by complying with a cited standard; . . . infeasibility of compliance . . . ."[274] The OSHRC rules list at least 9 such defenses.

To understand how these variables interact on a more tangible level, a short lesson or case study may be helpful. To return to the very simple subject of ladders,[275] some of the ladder standards are truly simple. Portable wood stepladders must have uniform parallel spacing, not greater than 12 inches, between the steps.[276] Other ladder standards are more open-ended. "A metal spreader or locking device of sufficient size and strength to securely hold the front and back sections in open positions shall be a component of each stepladder."[277] Or, "Ladders shall be maintained in good condition at all times, the joint between the steps and side rails shall be tight, all hardware and fittings securely attached, and the movable parts operate freely without binding or undue play."[278] Or, "Safety feet shall be kept in good condition to insure proper performance."[279] The potential areas for dispute under such standards are fairly obvious. Less obvious, but no less real, is the potential value of obtaining information regarding the contesting party's reasons for contending that the ladder was "in good condition," or that the movable parts satisfied the requirement of operating freely, "without binding or undue play."

Even a "simple" alleged violation of the simplest ladder standard has potential for complications, given the possibility of affirmative defenses and a burden of proof which often hinges on the information possessed by the employer. There may be an obviously defective ladder at the workplace, with two or three rungs missing, but where in the workplace was it located and who might have been exposed to the hazards of using it? Thus, in one case, a citation was vacated because "The ladder which was in the storage area was not in use, and the ladder which was observed in the skinning room belonged to an electrician who was wiring a lift hoist."[280] In another case, there was no evidence found to contradict the employer's assertion that the ladders had been located in the building when the employer acquired the building, but were neither needed nor used by employees.[281] In yet another case, the ALJ found that a ladder with a broken side rail had been brought into the employer's plant on the day before the inspection, that the employer had no knowledge of its presence until the moment of inspection, and the ladder had never been used at the worksite.[282] The potential for complications increases when the construction industry standards pertaining to ladders are at issue, because, among other things, of the multi-employer nature of the worksite.[283]

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[272] See, M. Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §§141-149; Bokat & Thompson, at 114-38.

[273] M. Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW §124.

[274] 29 CFR §2200.36(b)(1989)(emphasis added).

[275] See text at notes 51-53.

[276] 29 CFR §1910.25(c)(2)(i)(b) (1989).

[277] 29 CFR §1910.25(c)(2)(i)(f) (1989) (Emphasis added).

[278] 29 CFR §1910.25(d)(1)(i) (1989) (emphasis added).

[279] 29 CFR §1910.25(d)(1)(iv) (1989)(emphasis added).

None of the cases mentioned above appear to have been simplified proceedings cases. However, most of them predate both the simplified proceedings rules and OSHRC's current rules regarding hybrid fact-pleadings, so they arose and were decided under a procedural regime where pretrial development had some similarity to what is available under simplified proceedings. The main point, moreover, is that potential complications and problems of proof can arise in facially simple cases. It takes very little reflection to realize that the cases mentioned and cited above required more than an occurrence witness and often involved information possessed by the other party.

If further confirmation is needed of the complexities which are inherent in proving any case, no matter how facially simple, Appendix A should be sufficient. Appendix A summarizes more than 40 reported simplified proceedings cases. Conflicts in testimony, affirmative defenses, open-ended or

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[280] Midwest By Products, Inc., 3 OSHC 1408 (1975).

[281] Alpha Poster Service, Inc., 4 OSHC 1883 (1976).

[282] Allied Equipment Co., 5 OSHC 1401 (1977).

[283] See, E.J. Conti, Inc., 12 OSHC 1780 (1986) (citation for violation of 29 CFR 1926.450(b)(8) & .450(b)(12), where compliance officer testified that he observed two employees using the defective ladder, but "Conti's supervisor had his back to those employees [and] Conti's witness testified that its employees had their own ladders." [at 1781]) (Docket # 85-103); John R. Hughes Construction Corp., 10 OSHC 1989 (1982) (Citation upheld on circumstantial evidence, where compliance officer did not observe employees using the ladder). (Docket # 80-4354); Austin Power, Inc., 9 OSHC 1502 (1981) (ladder did not lead to area where employees were working and had been withdrawn from service) (Docket # 80-2591).

"general" standards, and most of the variables already discussed, seem fairly prevalent, to put it mildly.

In short, litigation before OSHRC is not always susceptible to being treated like a proceeding in small claims court or traffic court. True enough, some cases in fact turn out to be simple enough to dispense with pleadings and discovery. True enough, in particular cases, the issues may be simple. True enough, even before 1986, simplified proceedings probably were underutilized because the Department of Labor used its absolute veto power with considerable frequency.[284]

However, determining that a particular case is suitable for simplified proceedings, in view of the potential complexities of proof and affirmative defenses, is another matter. It is far easier to evaluate a judgment call in hindsight than it is to be the person who has to make the judgment call in the first place.

3. Actual Experience and Operation

a. Preliminary Explanation

A somewhat different approach will be used in discussing simplified proceedings than was used in addressing the experience with, and operation of, the SJ procedures earlier in this Report. The reasons for the differences should be fairly obvious. For one thing, simplified proceedings have a longer history than SJs, and this history has been both more controversial and more productive of friction. For another, the SJ has been the subject of a definitive earlier study, which provides criteria and touchstones for considering the actual operation of SJ procedures in a particular agency.

Moreover, as previously discussed, simplified proceedings are a very different kind of ADR mechanism than SJs. SJ procedures involve a discrete phase of a case, a temporary detour for mediation efforts. The circumstances which may be suitable for SJ procedures are reasonably well-defined (some form of impasse in bi-lateral settlement negotiations), and SJ has a fairly clear focal point (the mediation efforts of the SJ). SJ procedures have a more definite outcome, a touchstone for successful or unsuccessful use--did the case settle or become easier to settle? The party who agrees to using an SJ incurs few risks of adverse consequences.

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[284] See, 52 FR 4917 (February 19, 1987). Nevertheless, it should be recalled that, during the first few months of operation under simplified proceedings, Department of Labor vetoes were not automatic. Less than 40% of the requests for simplified proceedings were vetoed during this period. [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 200 (July 17, 1980). Furthermore, as indicated by Appendix A, the BNA service reported decisions in 11 simplified proceedings cases docketed in 1980, and seven docketed in 1981. In addition, Appendix B indicates another nine decisions resulting from cases docketed in 1980 and 1981, but not reported in BNA's service. In short, the Department of Labor veto became more frequent after a year or two of experience with simplified proceedings.

In contrast, simplified proceedings involve the entire case. The circumstances which may be suitable for simplified proceedings are nebulous and poorly defined.[285] The criteria by which the outcome of simplified proceedings may be evaluated are indefinite and relative to the evaluator. For instance, an ALJ and OSHRC might consider a simplified proceedings case successful if it results in a settlement or decision several months sooner than a conventional case. A pro se party might feel some psychological satisfaction at having his "day in court," and evaluate the proceedings favorably if he prevails on part of the case.

Finally, although simplified proceedings have generated a fair number of reported cases, many of these are decisions from the early 1980's.[286] Moreover, the reported decisions merely reflect the final outcome of particular cases. Because any criteria for "successful" use of simplified proceedings are subjective and relative at best, "case studies" of particular reported cases are unlikely to be very enlightening. The final ALJ or OSHRC decision masks an intricate set of variables which explains little or nothing about the initial decision to veto or agree to simplified proceedings.

Accordingly, this Report will concentrate on certain matters which seem, on reflection, to be of significance in understanding the actual operation of simplified proceedings. Among these matters are: (1) information regarding the actual number of cases where simplified proceedings are requested; (2) Department of Labor Regional Solicitors' policies on simplified proceedings; (3) considerations which should be involved in requesting or agreeing to simplified proceedings; (4) the actual outcome of reported ALJ and OSHRC cases where simplified proceedings were used; (5) the pro se nature of most requests for simplified proceedings; (6) the impact of increasing caseload on the use of simplified proceedings; (7) an analysis of ALJs' experience with, and perspectives on, simplified proceedings; (8) a comparison of ALJ and DOL perspectives; and (9) OSHRC's recently revised "Guide to Procedures," which is aimed primarily at the nonlawyer, pro se party.

b. Estimates and Numbers

Because the amount of "underutilization" is relevant to the seriousness of that problem and the need for corrective measures, there is some need for data regarding the number of cases in which simplified proceedings actually are being requested. However, statistics are not maintained regarding the number of cases in which simplified proceedings have been requested.[287] The lack of readily available statistics at the outset of this study did lead to obtaining some interesting estimates. DOL supervisory attorneys (who ventured an estimate) suggested figures ranging from a low of requests in 8-10% of the incoming cases, to a high of 25% (which was expressed in terms of being purely an estimate). ALJs estimates, in terms of absolute numbers, ranged from a low of 8 or 10 of their assigned cases per year, to a high of 50.

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[285] See text at notes 365-71.

[286] See Appendices A and B.

Fortunately, OSHRC provided a more precise nationwide figure for a two-month sampling period.[288] An OSHRC-conducted review of the files in 646 cases which became final during March and April of 1990 showed employer-filed requests in 87 of those cases--about 13.5%. The Department of Labor filed objections in 57 of the 87 cases--about 65.5%. An interesting feature of the OSHRC survey was the number of cases in which DOL had requested simplified proceedings: 7 from 4 different regional offices, a miniscule percentage, but not without potential significance. Again, the files reviewed were those which had become final during March and April of 1990. This means that the requests, objections, agreements, and other related events occurred prior to March and April. If nothing else, the information confirms that some Regional Solicitor's offices have been in a period of reevaluation and greater willingness to experiment with simplified proceedings.

c. DOL Regional Office "Policies" on Simplified Proceedings

Apparently, the Solicitor of Labor has not imposed any rigid policy on the Regional Solicitors regarding simplified proceedings. The DOL OSH Counsels and the other individuals in the Regional Solicitors' offices (hereinafter, regional offices, or offices) who were contacted therefore differed in their approach to simplified proceedings. Individuals in six of the Department's eight regional offices, and two of the regional suboffices, were contacted. Because of the variations among these offices, and because of the importance of understanding the reasons for the frequent exercise of the veto power, a more detailed account of the policies and procedures followed by each office is contained in Appendix C.

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[287] If a request is not vetoed, the case docket-number has an "s" suffixed to it. However, the only way to determine which cases involve a vetoed request for simplified proceedings is to examine the case files themselves.

[288] Except as otherwise indicated in the text, the information was provided to the author of this report in a letter from the Executive Secretary of the Occupational Safety and Health Review Commission, dated July 27, 1990. The author wishes to express his appreciation for the information and for the extra work and effort of OSHRC personnel in compiling it.

Overall, the regional offices contacted, with one exception, indicated some degree of flexibility in responding to requests for simplified proceedings. Only one office reported a firm policy against agreeing to simplified proceedings in any and all cases. The degree of flexibility in most of the other offices, however, was limited. As will be discussed below, the considerations in favor of vetoing simplified proceedings are numerous; incentives for agreeing to simplified proceedings are few. The net result in most of these offices can be described fairly as a presumption against agreeing to simplified proceedings, with the presumption being very strong in some offices and not quite as strong in others. Even where veto is not automatic, most offices are highly selective, and the few simplified proceedings requests which are not vetoed involve cases which usually settle. In the regional office which was most amenable to simplified proceedings, a case-by-case screening kept the number of simplified proceedings at a fairly low level.

d. Considerations Involved in Requesting or Agreeing to Simplified Proceedings

Preliminary Observation: Pro Se Parties

On one point there was agreement: pro se parties make most of the requests for simplified proceedings. There are exceptions, of course. Moreover, an employer sometimes retains an attorney after the initial request is vetoed or agreed to.[289] However, there was a very strong consensus that requests for simplified proceedings usually come from pro se parties.

Furthermore, pro se parties are fairly common in litigation before OSHRC generally. They are by no means limited to simplified proceedings. The significance of the pro se nature of much OSHRC litigation in general, and of simplified proceedings in particular, will be discussed later in this Report.[290]

However, at the present juncture, the pro se element is emphasized because the pro se party is a significant part of the real world framework in which the considerations discussed below operate. Those considerations must be viewed, therefore, as operating in the context of a setting where the decision to veto or agree to simplified proceedings usually involves dealing with a pro se party.

1. Professional Responsibility and Problems of Predicting Suitability of a Case for Simplified Proceedings. One consideration which needs to be singled

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[289] For example, filings in Interior Constructors, Inc., 12 OSHC 1942 (1986) indicate a request for simplified proceedings filed by the company superintendent in November 1985. (Letter to OSHRC from R. Terry Oates, Superintendent, Interior Constructors, dated Nov. 4, 1989) and the transcript indicates that an attorney representing respondent made his first appearance at the hearing.) (Transcript of Hearing, 4.)

[290] See text at notes 310-27.

out for special attention is the interaction between an attorney's professional responsibilities and the calculated risk which is inherent in requesting or agreeing to simplified proceedings. Requesting or agreeing to simplified proceedings waives potentially important procedural rights. The attorney is not waiving rights personal to the attorney. The pro se party is. The pro se party is not encumbered by rules governing the attorney's professional responsibility toward a client.[291] The attorney is. For better or worse, professional responsibility incorporates the adversary model. A decision to opt for simplified proceedings, or any form of ADR, hinges on the client's best interests, not the attorney's or the judge's.

Although attorneys for a government agency are not in precisely the same position as attorneys for a private party, the relevant differences with respect to core professional responsibilities are minimal.[292] Considerations of professional responsibility apply with equal force to an attorney representing an employer. If the situations were reversed, an attorney representing an employer confronted with a government request for simplified proceedings certainly should consider the professional implications of waiving hybrid fact-pleadings and discovery as a matter of right. In fact, a private attorney will have even less information on which to base an informed decision than the DOL attorney during the early stages of a case.

The DOL attorney, time permitting, can review the investigative files, discuss the case with the compliance officer, and even attempt direct contact with a pro se party. Assuming these efforts yield indications that the case probably could be handled under simplified proceedings, a strong element of calculated risk remains. The phrase "Russian Roulette" comes to mind. With time and effort invested promptly after receipt of the request for simplified proceedings, the risks would be reduced, but not eliminated. So, probabilities are involved. As a matter of hindsight, there are certainly some cases that could have been handled as simplified proceedings. However, at the time the decision to agree or object must be made, the benefits of hindsight are lacking.

Moreover, whether representing an employer or the government, the attorney's necessary information gathering requires time, which cannot always be easily spared from other professional responsibilities. A request for simplified proceedings must compete with pleadings, discovery, negotiations, trial preparation, hearings, briefs, and a host of miscellaneous demands constantly percolating in a lawyer's office.

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[291] See, ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.3 and Comment.

[292] See, ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULES 1.2, 1.3, 1.6, 1.13 ("ORGANIZATION AS CLIENT"); 2.1; 3.1.

Of course, the possibility exists, in theory, of reverting to conventional proceedings[293] or obtaining permission for discovery. At best however, this only means later resort to the very "paperwork" complications which could have been avoided by a decision against simplified proceedings in the first instance. At worst, the attorney will be stuck with the early decision to request or agree to simplified proceedings, especially if the other party is pro se.

2. Alternatives to Simplified Proceedings. Another general consideration involves the availability of informal alternatives to simplified proceedings. In light of alternative ways to "simplify" conventional proceedings, the incentives for an attorney to use simplified proceedings are even weaker. Essentially, simplification is relative and a state of mind, not absolute and a set of rules. Parties who genuinely want to simplify the litigation of a case do not need to invoke formally any rules regarding simplified proceedings. The parties can simplify a great deal by mutual consent, between themselves, without the need for early commitment to simplified proceedings and potential for later complications, if simplified proceedings turn out to be unsuitable.

For instance, there is absolutely no rule requiring the parties to engage in discovery. As a practical matter, parties can even agree to simplify the pleadings, unless the ALJ wants to act sua sponte and unilaterally by issuing a show cause order to both of them.[294] In other words, the parties can simplify matters between themselves, without making an early commitment to the all-or-nothing simplification contemplated by simplified proceedings.

The lawyers who are experienced in OSH Act matters, and perhaps even the experienced or sophisticated pro se parties, already know that there are shortcuts and alternatives which can simplify the case on an ad hoc basis.[295] A lawyer who is not OSHA-experienced, but wants to hold down costs to the client or avoid unncessary paperwork, will be motivated to work out shortcuts and accommodations on an ad hoc basis, lawyer to lawyer, without jeopardizing flexibility at the very outset of the case. (Moreover, although this is somewhat speculative, a lawyer who is not OSHA-experienced probably will be very reluctant to waive pleadings and discovery at the outset of a case precisely because the lawyer is on unfamiliar legal terrain.[296]) An experienced or sophisticated pro se party who is familiar with OSHRC proceedings (e.g., the safety director of a middle-sized company) can work out accommodations and shortcut as well as, if not better than, an inexperienced lawyer. This leaves only the inexperienced or unsophisticated pro se party, who will be discussed in more detail later in this Report.[297] But even this party is not necessarily going to encounter the full panoply of procedural niceties. As indicated in Appendix C, some DOL attorneys and regional offices have a policy of promptly initiating discussions with a pro se party. Early contact with the pro se employer can either "short-stop" a request for simplified proceedings or result in early settlement which moots the need for any litigation at all.

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[293] 29 CFR §2200.204 (1989).

[294] 29 CFR §2200.41(a)(1) (1989).

[295] Four attorneys with considerable experience in representing employers in OSHA cases who were contacted during the study confirmed this point, which was also made by several DOL attorneys. Directly or indirectly, they all indicated that considerable simplification can be achieved via bi-lateral agreement and accommodation. If nothing else, in describing their approach to handling OSHA cases, they indicated that a substantial amount of informal agreement on procedures, as well as substance, occurs.

Finally, the continuing substantial percentage of pro se parties in reported conventional cases[298] suggests one of two possibilities. Either some simplification often occurs in fact, or conventional proceedings are not so complex as to present insurmountable barriers to substantial numbers of pro se parties. In short, the availability of informal alternatives is another consideration which operates against the use of simplified proceedings. Even the most complex case can be simplified if the parties cooperate with each other. All the more so, a case which is truly simple enough to be suitable for simplified proceedings can be streamlined by the parties themselves.

3. Calculated Risk Assessment: Variables and Factors. A third consideration is the risks involved in requesting or agreeing to simplified proceedings. Actually, this consideration subsumes a number of variables and factors which should be taken into account in determining whether to use simplified proceedings. For the most part, this consideration applies mainly to Department of Labor attorneys who must decide whether to agree to a request for simplified proceedings. Therefore, most of the following discussion will be in terms of the risk assessment, variables, and factors of special relevance to the Department of Labor. However, in theory at least, some of the variables and factors apply to, or have counterparts which should concern, parties other than the Department of Labor.

As Appendix C indicates, Department of Labor personnel who provided information for this Report mentioned a wide range of factors and criteria which were considered in determining whether to agree to simplified proceedings. In no regions were the factors and criteria the same, although some recurred in various forms and articulations. Nor should any inference be drawn that all attorneys actually conduct a "risk-assessment" analysis involving the factors summarized below. The information from DOL attorneys was useful, however, because it did suggest many of the "considerations" which are set out below. Therefore, whatever the actual practice in a particular regional office may be, the factors and criteria mentioned by various attorneys provided the raw material for a summary or synthesis of a number of particular, and a few general, considerations in determining the suitability of a case for simplified proceedings.

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[296] The point is not entirely speculative, however. A Little Rock attorney who has considerable experience in representing employers in OSHA cases stated that he has never used simplified proceedings and described the 10-day requirement for requesting simplified proceedings as a "weak point."

[297] See text at notes 310-17, 323, 359-60.

[298] See text at note 318, and note 318.

Essentially, any decision to veto or agree to simplified proceedings should involve a kind of risk assessment. From the Department of Labor standpoint, the relatively more precise factors and criteria which might be included in this assessment are:

(1) hazard abatement; e.g., a mooted hazard which is unlikely to recur versus a continuing potential hazard arising from conditions, equipment, or practices in the workplace.

(2) related to hazard abatement, the safety consequences of the citation's being vacated and res judicata's barring of subsequent required abatement.

(3) whether the employer in fact is unequivocally committed to contesting only the amount of penalty;[299] if the violation is conceded, and the amount of proposed penalty is small (or even fairly substantial), the range of disputed issues is likely to be limited, with pleadings, discovery and even a conference/hearing being superfluous.[300]

(4) the classification of the violations, whether serious, other than serious, repeated, etc.

(5) the number of contested items; as the number of contested items increases, the case reaches a point where, cumulatively, it begins to get complex and more difficult to treat as "simple."[301]

(6) whether the violation can be established definitely by testimony of the compliance officer(s) alone.

(7) the compliance officer's experience and capability as a witness.

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[299] Complete reliance cannot be placed on the notice of contest itself, in determining whether the notice of contest is limited solely to the amount of proposed penalty. Firm and unequivocal commitment to disputing only the penalty is necessary, because OSHRC will allow an employer to later contest the citation if the employer shows that the original notice of contest was intended to challenge both the citation and penalty. William W. Turnbull, 3 OSHC 1781 (1975). For a more complete discussion of this matter, see Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §276, and Bokat & Thompson, 350-56.

[300] See, King Tool, 14 OSHC 1342 (1989) (Docket No. 89-610S) (penalty-only, decision based on stipulations).

[301] See, Burnetex Industries, Inc., 13 OSHC 1941 (1988) (Docket No. 87-193S)(eleven violations); see also summary of this case in Appendix A).

(8) the quality of the investigative file (e.g., details on elements of essential prima facie case, photographs, indication of affirmative defenses, etc).

(9) the requirements of the cited standards, e.g., specific, "measurable" requirements versus more open-ended "general" requirements.[302]

(10) whether satisfying the prima facie burden of proof and meeting foreseeable affirmative defenses will require information or documents in the possession of the respondent.[303]

(11) the need for testimony and evidence from witnesses other than the respondent, especially witnesses who are employees of the respondent.

(12) the need for expert testimony.

(13) the possibility that the respondent will use expert testimony, bearing in mind that "expert" witnesses may include a wide range of individuals who may be de facto experts by virtue of experience and not just because they possess academic degrees.[304]

(14) overall workload, a factor of increasing importance, which warrants separate discussion.[305]

(15) the likelihood, based on initial contacts or prior experience, that the pro se respondent will be cooperative in narrowing the issues in dispute.

There are also some less precise variables and factors, rather vague, general or subjective in nature. These more nebulous and inchoate factors include: (1) as already discussed, the attorney's sense of professional responsibility; (2) whether discovery will be needed (a factor classified here among the vague and nebulous because it begs the question); and (3) prospects for settling the case.

In sum, an informed decision on vetoing or agreeing to simplified proceedings requires a kind of semi-intuitive mix of objective and subjective risk assessment, based on limited information and, sometimes, initial contact with the pro se respondent. A number of factors and variables are involved. There is a kind of fuzzy "decision tree," where a negative on any item suggests a negative response to simplified proceedings.

From the perspective of the Department of Labor attorney, who has the burden of proof under the "law enforcement" model which the OSH Act establishes,[306] the cost-effectiveness of this exercise in risk assessment might be questionable. The safest, and simplest, option may be to veto a request for simplified proceedings.

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[302] See text at notes 49-59, 275-83.

[303] Cf. OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION, A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 17 (rev. ed. 1988).

[304] Cf. Texas Trident, 13 OSHC 1615 (1988) (Docket No. 87-442S).

[305] See text at notes 328-31.

[306] See text at notes 44, 77-90, 269-84.

be questionable. The safest, and simplest, option may be to veto a request for simplified proceedings.

4. The Type of "Simplification" Imposed by Simplified Proceedings. Although this consideration overlaps some of those already discussed, it has sufficient force to justify separate treatment. Simplified proceedings achieve "simplification" by eliminating hybrid fact-pleadings and discovery as a matter of right.[307] How much true simplification of the case itself results from this expedient is open to question. The elimination of both pleadings and discovery as a matter of right does not convert a difficult case into a simple one. Indeed, it might result in complicating a simple case. Minimal need for hybrid fact pleadings and discovery is a symptom of a simple case, not its cause. Elimination of pleadings and discovery, per se, simplifies nothing about the merits of the case. As will be discussed toward the end of this Report, insufficient attention has been paid to what makes a case suitable for simplified proceedings.[308]

e. Outcome of Litigated Simplified Proceedings

Appendix A summarizes more than 40 reported simplified proceedings cases. If nothing else, Appendix A should confirm that ALJs take seriously the Department of Labor's burden of proof. Appendix A also confirms that the complexities of proving a case and meeting affirmative defenses certainly are not eliminated, or even simplifed, by simplified proceedings. If anything, Appendix A verifies the need for being highly selective in agreeing to simplified proceedings.

The win-loss ratio, of course, should not be all-important. However, a rough tally of the cases in Appendix A indicates 48 alleged violations affirmed, 2 affirmed but modified, 44 vacated, and 2 reduced to de minimis. In addition, Appendix B lists 13 additional simplified proceedings including ALJ decisions which were located, but not summarized. A rough count of the case outcomes in Appendix B indicates the following: 13 affirmed, 11 vacated, 1 modified. The rough total then would seem to be 61 violations affirmed, 55 vacated, 3 affirmed but modified, and 2 reduced to de minimis (which is tantamount to being vacated).

Certainly, the outcome in every single case might have been the same even under conventional proceedings. Many variables influence the outcome of a case and the judge's decision. But a loss rate approximating 48% cannot be considered an incentive to agree to simplified proceedings.

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[307] See text at notes 236-43.

[308] See text at notes 361-71.

cases which were settled favorably, and the alleged violations which were affirmed, are unlikely to be remembered as forcefully as those which were lost. No matter how deserved the loss might be, some tendency might have arisen in many regions to associate simplified proceedings with a greater likelihood of losing a case because of insufficient pretrial development. While this is largely speculation, Appendices A and B indicate that simplified proceedings cases during the first few years reached the reported decision stage in several different regions. In recent years, decisions from one region predominate.

f. Pro Se Parties.

A whole constellation of problems, and oppportunities, arise from the fact that most simplified proceedings are requested by, and involve, pro se respondents. The pro se litigant is not unique to OSHRC,[309] and the pro se litigant's problems are closely related to the goals and purposes of ADR.[310]

Pro se litigants have long been with us, but they are one of those discomforting and very neglected problem children[311] of the legal system. The system as a whole is distinctly ambivalent about the pro se party. On the one hand, the right of a party to appear pro se is veritable hornbook law. On the other hand, as one commentator has observed,

> This basic right has created an ordeal in the courts arising from the statement, "I wish to represent myself. From this point on, the adversary system . . . is out of synchronization. The judge is faced with the task of balancing fundamental fairness and order in the proceedings. The pro se litigant must struggle with how to present his or her case. The opposing attorney must protect and advocate his or her client's interest, while meeting the legal obligation to bring the truth to the court's attention.[312]

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[309] See, e.g., Aspen, Assisting the Pro Se Litigant: Unauthorized Practice of Law or the Fulfillment of a Public Need? 28 N.Y. LAW SCHOOL L. REV. 691 (1983); Committee on Federal Courts of the New York State Bar Association, Pro Se Litigation in the Second Circuit, 62 ST. JOHN'S L. REV. 571 (1989); Kim, Legal Education for the Pro Se Litigant: A Step Toward a Meaningful Right to Be Heard, 96 YALE L. J. 1641 (1987).

[310] See, e.g., L. Singer, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 4-5, 161 (Westview Press, 1990).

[311] See, Rubin, The Civil Pro Se Litigant v. the Legal System, 20 Loyola U. of Chi. L. Rev. 999, 1000, and n.6 (1989)(noting that the National Judicial College has very few materials on pro se parties in its resource bank, and those apparently deal with trial disruption situations).

[312] Id. at 1000.

> client's interest, while meeting the legal obligation to bring the truth to the court's attention.[312]

Nor are the problems limited to actual trial proceedings in the courtroom. An attorney dealing with a pro se party prior to trial is in a somewhat delicate ethical posture.[313] Every pro se litigant is a potential problem in a system following the adversary model, and lawyers are conditioned to following the adversary model. Lawyer's horror stories about pro se parties are not uncommon,[314] and one writer has referred to "a special club of paranoid trial lawyers: those who appreciate the difficulties of pro se litigation."[315]

To its credit, OSHRC has fostered a litigation atmosphere which is far from hostile to the pro se litigation. Pro se litigants are recognized,[316] and in fact, OSHRC goes the judicial system one better by authorizing nonattorneys to represent parties in its proceedings.[317]

Conventional OSHRC proceedings involving pro se parties are rather common, especially in the reported ALJ decisions. Even cursory review of a volume of reported ALJ and OSHRC decisions gives the impression that a substantial proportion of employers appear pro se in nonsimplified proceedings cases. To confirm this impression, a rough count of OSHRC ALJ decisions reported at pages 1300-1500, and pages 1000-1100 in Volume 13 of BNA's Occupational Safety and Health Cases indicates that approximately 37.6% of the conventional, nonsimplified proceedings cases involved pro se parties. The tally, admittedly rough but certainly verifiable, disclosed about 69 conventional proceedings cases decided by ALJs, with pro se employers in at least 26 of those cases.[318]

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[312] Id. at 1000.

[313] See, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 274-76 (1984) (Rule 4.3: Dealing with Unrepresented Person); G. Hazard & W. Hodes, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 439-44 (1987 supp).

[314] See, P. Zuydhoek, Litigation Against a Pro Se Plaintiff, 15 LITIGATION 13 (Summer 1989).

[315] Id. at 61.

[316] 29 CFR §2200.22(a) (1989).

[317] Id.; for a discussion of nonlawyer representation, see generally, Hostetler, Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines, 2 ADMIN. L. J. 85 (1988) (based on a study prepared for ACUS).

[318] The methodology of this tally admittedly was rough, but anyone interested can consult 13 OSHC (BNA), at 1300-1500, and 1000-1100, to make his or her own count. The ALJ & OSHRC decisions were scanned rapidly, the parties' representatives noted, and totals for each 100-page block were added up. The OSHRC decisions were not counted in the final total, because these decisions are at the appellate review, rather than the trial, level. (It should be mentioned that BNA's OSHC Reporter also includes a number of state and federal court decisions

As far as pro se parties at trial level are concerned, the following general description of trial judges' conduct of pro se hearings seems to apply with equal force to OSHRC ALJs. "In attempting to be fair and to further the discovery of truth, a court may find itself explaining rules and procedures and asking questions of witnesses. In this regard, the court has broad discretion as to its role in providing a fair trial to both parties."[319]

Even as to a pro se party's pleadings, judicial liberality in allowing amendments, and in construing the pro se's pleadings, is something of a norm.[320] OSHRC seems to follow the pattern of the courts in this respect. According to one text, "[T]he two most common errors made in answers have been untimeliness in filing and deficiencies in form. Both types of errors have been excused where there were extenuating circumstances, but this has usually involved pro se employers."[321] OSHRC itself has emphasized its liberality, even when ruling against a party:

> While we attempt to afford parties every indulgence in order to provide them with their day in court, we cannot do so where a party continually ignores time limits of which it had actual knowledge, and, upon being requested to do so, offers no reason for not meeting those limits.[322]

However, OSHRC's latitude and flexibility regarding pro se parties does not reduce the problems inherent in dealing with pro se parties. In fact, by fostering an atmosphere favorable to pro se litigation, it increases the frequency with which government lawyers and OSHRC ALJs will encounter those problems. Indirectly, this probably contributes to a negative attitude in the prosecutorial arm toward simplified proceedings, for at least three reasons.

In the first place, all DOL regional offices have some experience with pro se parties under conventional procedures, so the DOL attorneys encounter many pro se parties who are quite capable of handling a case under conventional procedures. They know that ALJs quite properly give due consideration to pro se parties in conventional proceedings. From the

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identical (e.g., Horace Hypothetical appearing for Hypothetical Construction). If the case merely indicated that a party was represented by a named individual, whose name was not reflected in the company or corporate name, the case was counted as not being pro se.

[319] Rubin, *supra* note 311 at 1002.

[320] Id. at 1004-05; see also, Ouzts v. Cummins, 825 F.2d 1276 (8th Cir., 1987)(pro se complaint to be liberally construed and not dismissed unless plaintiff can prove no set of facts to support claim).

[321] M. Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW, §358.

[322] Chopko Construction Co., 4 OSHC 1775, 1976-77 OSHD 21,144 (1976). (Quoted in M. Rothstein, OCCUPATIONAL SAFETY & HEALTH LAW, §358.)

many pro se parties who are quite capable of handling a case under conventional procedures. They know that ALJs quite properly give due consideration to pro se parties in conventional proceedings. From the attorneys' perspective, the main difference between a truly simple case under conventional proceedings and simplified proceedings may be that the government has no right to require the production of information from the other party prior to the conference/hearing. In the second place, the DOL attorney who has encountered problems with pro se parties in conventional proceedings is unlikely to be favorably inclined toward simplified proceedings involving a pro se respondent. Those problems can only be worse under a procedural regime where there is literally no way to assure needed pretrial development and narrowing of issues if the pro se party fails to cooperate.

In the third place, even if the DOL attorney is not unfavorably inclined toward pro se parties, and the case is genuinely simple, the need for simplified proceedings is minimal. Again, there are alternatives. With a cooperative or relatively sophisticated pro se party, any number of simplifying measures can be implemented, without waiving at the outset of the case procedural rights which could be needed if early cooperation turns sour.

Nevertheless, and notwithstanding all of the above, some pro se parties are at a serious disadvantage in conventional proceedings. However, the word "some" is crucial.

There is an important aspect of the pro se "problem" which has gone largely unnoticed and which in no small part is responsible for a great deal of confusion, friction, and misunderstanding. This aspect of the problem is so obvious, and yet so subtle, that it might go unnoticed by anyone who does not deal with pro se parties literally on almost a daily basis.

Simply put, the pro se population is diverse. There are different kinds of pro se parties. Pro se parties are not fungible. Like any other group, pro se parties cannot be stereotyped or lumped together indiscriminately.

At one extreme, there is the "truly small" employer, to borrow a phrase from a Department of Labor paralegal employee who deals directly and regularly with pro se parties in simple OSHA cases, and who provided some valuable insights into the pro se problem. The "truly small" employer may operate a business on a part-time basis, with only one or two employees. Frequently, the "truly small" employer is an individual with a skilled specialty in the construction industry, whose business may consist of some tools, a truck, and a cleared space on the kitchen table at home, which serves as an office. This pro se employer may be quite difficult even to contact away from the worksite.[323] This "truly small" pro se employer also is likely to be uncomfortable when dealing with written materials. This pro se employer may genuinely need simplified proceeedings, and may not even read the OSHRC GUIDE.[324] This "truly small" employer may not even know that simplified proceedings exist, unless informed by someone else about them. This is the pro se employer who comes to mind as something of a stereotype when the phrases "day in court," or "pro se" are uttered.

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[323] See, Knight & Knight Construction, 14 OSHRC 1096 (1989) (compliance officer hand-delivered citation to employer's home address).

Many employers who appear pro se are several stages removed from this stereotype. In the experience of the Department of Labor paralegal who provided important insights and information regarding pro se parties, it is the relatively larger employers who are more likely to request simplified proceedings. A company large enough to have a safety supervisor, or with enough employees to have some kind of management staff or hierarchy, is likely to be better informed, much more likely to have someone who has read the OSHRC Guide, and more likely to request simplified proceedings than the "truly small" employer.

The continuing substantial percentage of pro se parties in conventional proceedings[325] strongly tends to confirm the fact of a rather diverse pro se population. Either many pro se parties are perfectly capable of handling conventional proceedings in a relatively simple case, or some kind of simplification occurs in those conventional proceedings anyway.

True enough, the more sophisticated pro se parties may regard pleadings and responding to interrogatories as a time consuming nuisance. However, a substantial business enterprise today is unlikely to hire, or be run by, illiterate individuals. The pleadings or other written materials in an OSHRC conventional proceeding may be unfamiliar to them. Nevertheless, managers, safety directors, and others in positions of responsibility deal regularly with written materials of equal, or sometimes greater, complexity.

Thus, for many pro se parties, their "day in court" is unlikely to be truly jeopardized by conventional proceedings. An individual does not have to be a lawyer to be quite capable of filing a sufficient and thorough answer even in a very massive case.[326] For many pro se parties, therefore, simplified proceedings may be a matter of convenience and time-saving. These are legitimate motives, but giving such interests controlling weight would seem dubious. Certainly, it is highly questionable whether convenience and time-saving, standing alone, would justify simplified proceedings on demand. In any event, the present rules governing simplified proceedings lump together indiscriminately pro se parties who are quite capable of handling conventional proceedings and pro se parties whose need for simplified proceedings is much more acute.

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[324] See text at notes 345-47.

[325] See text at notes 317-18 and note 318.

[326] A good example of a very thorough answer submitted by a company representative is found in the case file for Anderson-Tully Co., OSHRC Docket No. 87-158. The answer, denominated "Response to Complaint," addresses more than 180 items in a massive citation, and does so in a way which regrouped the cited items "by Mill or Department location to reduce the time lapses involved in locating witnesses. . . . " Letter to ALJ from company representative dated January 11, 1988.

In short, the "day in court" rationale does not hold up very well for many pro se parties. To the extent that simplified proceedings are supposed to help the small pro se party of limited means get his "day in court," simplified proceedings are very overinclusive.

If the dominant purpose of simplified proceedings is cost-effectiveness, then OSHRC's recurrent proposals to eliminate the absolute veto and substitute a near-absolute right to simplified proceedings on request[327] could backfire. The time and effort saved by pro se parties who do not have to comply with pleading and discovery requirements could be offset by the costs of an increased caseload and the inefficiency of sorting out, at conference/hearing, issues that could have been resolved during pleadings and discovery. Furthermore, if cost-effectiveness is so paramount, it would seem that serious reconsideration must be given to the whole regime of hybrid fact-pleading and discovery of right in the rest of the OSHRC system.

As will be discussed near the end of this Report, the purpose of simplified proceedings has been the subject of a kind of double vision. Simplified proceedings have not benefitted from that double vision. If the main purpose of simplified proceedings is to help the pro se party, it would seem that a less over-inclusive, and more direct, means of providing such help should be considered.

g. Increasing Workload.

The number of contested cases has been increasing steadily over the past few years. In FY 1986 OSHRC received 1,729 new cases.[328] In FY 1988 there were 2,746.[329] Both OSHRC and DOL are feeling the effects of more cases without a corresponding increase in legal staff. OSHRC is especially vulnerable to problems created by an increasing workload because it has a smaller number of ALJs among whom cases can be redistributed in the event of serious illness, incapacity, or other situations calling for reallocation of caseload. The number of OSHRC ALJs has remained at a total of 18,[330] although the Chief ALJ recently indicated an additional ALJ had been hired. From the DOL perspective, there is a distinct possibility that pressures of increasing workload and limited staff resources may incline more regional offices to make use of simplified proceedings. Recent statistics provided by OSHRC indicate this already may be happening.[331]

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[327] See text at notes 219, 220, 230-32, 244-62.

[328] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 4 (for FY 1986).

[329] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, "The Occupational Safety and Health Review Commission" 5 (for FY 1988).

There is both a positive and a negative side to this possible development. On the negative side, workload alone is not a very good reason for using simplified proceedings. If simplified proceedings have intrinsic merit, they should not be used merely as a temporary expedient, subject to the ebb and flow of workload. On the positive side, a broader base of recent experience may lead to improvements. If the experience is satisfactory, reassessment and reevaluation of policies may follow. Strengths and weaknesses in the present system can be judged on the basis of actual recent experience in several different regions. A much better concept of what makes a case suitable for simplified proceedings may develop, leading to a more informed exercise of the veto power and perhaps even to a workable consensus between OSHRC and DOL on simplified proceedings.

4. ALJ Experience and Perspective

ALJ experience with, and perspectives on, simplified proceedings are described in more detail in Appendix D. Summarizing very generally, however, most ALJs who provided information for this Report viewed simplified proceedings favorably, although several have had no recent experience with them. Most, but not all, of the ALJs contacted believed that the Department of Labor's power of absolute veto should be modified, or eliminated.

The ALJ's experience and perspectives will be analyzed below, at some risk of oversimplification, under three main topic headings: (1) Pro Se Parties; (2) Compliance with 29 CFR §2200.206; and (3) Actual Conduct of the Conference/Hearing.

a. Pro Se Parties

Despite considerable differences of opinion between ALJs and DOL attorneys on many aspects of simplified proceedings, the ALJs tended to confirm several points already made regarding pro se parties. Among the ALJs who were experienced in presiding over simplified proceedings, there parties, whether in simplified or conventional proceedings, is different from the way they would handle cases where a party is represented by an attorney. As suggested by one ALJ, the differences are hard to articulate, but for pro se's more latitude is the norm and the atmosphere is probably more "personal." There were, of course, variations among these ALJs in style and in substance. However, some degree of latitude seems commonly accorded pro se parties in conventional proceedings. Consequently, from the ALJ perspective the differences between a hearing in a pro se simplified proceedings case and a hearing in a pro se conventional case may be marginal. In fact, it is impossible to tell, simply by reading an ALJ's written opinion, whether or not a case has been tried under simplified proceedings. If the text of the opinion does not itself mention simplified proceedings, the only way to determine whether simplified proceedings were used would be the "s" added to the docket number, or an examination of the file itself.

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[330] Id.

[331] See text at note 288.

The main difference between conventional proceedings and simplified proceedings, of course, is that conventional proceedings retain a pleading and discovery stage. Even there, the pro se party is not necessarily going to be held to the standards expected of an attorney. Although a pro se party in conventional proceedings is subject to the consequences of inadequate responsive pleadings and failure to respond to discovery,[332] the ALJs have considerable discretion regarding imposition of sanctions under the relevant OSHRC rules.[333] Again, the continuing substantial percentage of pro se parties in conventional proceedings suggests several possibilities: (1) the latitude usually extended to pro se parties includes the prehearing pleading and discovery stages; (2) pro se parties in many of these cases are able to deal with pleading and discovery requirements; or (3) some form of simplification is actually occurring.

At any rate, the differences between a pro se hearing in simplified proceedings cases and conventional cases seem minimal or nonexistent. More specifically, in either type of proceeding, the ALJ may need to be somewhat active in asking questions, clarifying responses, and to a certain extent, helping the pro se present his side of the case. This is not necessarily a matter of sympathy for the underdog. The ALJ has some duty to maintain a coherent record of the proceedings.[334] Many pro se parties have very little concept of what is relevant, and framing questions to elicit testimonial evidence is an art record of the proceedings.[334] Many pro se parties have very little concept of what is relevant, and framing questions to elicit testimonial evidence is an art that even some attorneys fail to cultivate. Moreover, the substance of what the pro se party is trying to communicate is more important than legal jargon. The pro se party is very unlikely to say, "I have an affirmative defense of uncontrollable employee misconduct." More likely, he will say, "We have strict rules about wearing hard hats and we enforce them. If you don't believe me, I fired a guy last year over it." The pro se party, of course, may also do things like "objecting" in the form of interrupting a witness and contradicting or giving his version of the particular matter, in effect testifying. (As an example of the kind of "adjustments" that can be made in pro se hearing, the ALJ can put the pro se respondent under oath at the start of the proceedings, so that such statements can be considered evidence).

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[332] E.g., 29 CFR §2200. 41, .52 (e) (1989).

[333] E.g., 29 CFR §2200.41 (1989) (the ALJ "in [his] discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules"); 29 CFR §2200.52(e) (failure to cooperate with discovery, "may make such orders with regard to the failure as are just.") (Emphasis added.)

[334] Cf., 5 U.S.C. §556(c)(5), (e) (1988).

Although some pro se parties may not have much of a case and are mainly ventilating, ALJs in one way or another recognized the importance to a pro se party of his "day in court," even if, and perhaps especially if, the party is mainly "ventilating." But not all pro se parties are merely ventilating. Some are quite capable of presenting a case effectively, focusing on matters validly in dispute, rather than contesting anything and everything. Given some latitude, a well-prepared pro se who is familiar with the facts at issue can present those facts at a hearing, and probably do it better than an unprepared attorney would.

As far as simplified proceedings are concerned. the reported cases demonstrate that pro se parties often fare rather well in simplified proceedings.[335] Whether this was in spite of, or because of, being pro se, is, of course likely to be arguable.

b. Compliance with 29 CFR §2200.206

The OSHRC regulations contemplate that informal discussions between the parties will substitute for pleadings and discovery.[336] Therefore, if simplified proceedings are to be used, it would seem vital for the parties actually to conduct such discussions prior to the conference/hearing[337] and for the ALJs to police compliance with this requirement.

The practices of the ALJs varied somewhat as to ways in which they tried to assure that the informal communication between the parties at least would be attempted. Those who affirmatively "policed" the matter used various techniques, which included: a formal prehearing order, a required report from the DOL attorney, sending a notice or letter to the parties, and sometimes a conference call. Others made informal inquiry when checking the status of the case a week or so before the scheduled hearing.

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[334] Cf., 5 U.S.C. §556(c)(5), (e) (1988).

[335] See, Appendix A and Appendix B.

[336] 29 CFR §2200.206 (1989).

[337] 29 CFR §2200.205 (1989).

However, parties did not always adhere to the provisions of 29 CFR §2200.206, despite its importance. Obviously, of course, in cases which settled prior to conference/hearing, the parties had been in contact, and in many others, the informal discussions occurred. Still, ALJs mentioned enough incidents to be some cause for concern. A simplified proceedings case, no less than any other, should be developed before the hearing. The narrowing of disputed issues should not be dropped entirely in the lap of the ALJ at the conference/hearing. To do so invites confusion, complications, and error.

c. Actual Conduct of the Conference/Hearing

The conference/hearing is flexible. ALJs can proceed with more, or less, formality depending on the circumstances and the parties. For example, the conference phase can be, and sometimes is, handled very much like an ordinary pretrial conference, the main difference being that the conference phase is followed immediately by the more formal hearing. However, the procedure also can operate as a dispute resolution tool.

The potential for the conference/hearing to serve a dispute resolution role is indicated by an excerpt from a transcript in Appendix D. There, because the conference phase was on the record, the ALJ was able essentially to decide the case in the manner contemplated by Commissioner Cleary's article: "an informal conference-type proceeding."[338] A few lines from that transcript bear repeating here.

> ALJ: This is the beginning of a simplified proceeding. What we do is talk it over and see if we can resolve the case, if I can help in any way. If not, then we'll go to an actual hearing. . . .
>
> Since it's simplified, we don't have the Federal Rules of Evidence. But what I'll do is put a witness chair over by the reporter so that if someone is testifying, they'll be over here to the right.
>
> [Pro se employer]: They'll be sworn in and everything?

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[338] Cleary, Pleading and Practice Before the Occupational Safety and Health Review Commission, 24 LAB. L. J. 779, 787 (1973).

> [ALJ]: Be sworn in and everything. It will be just like a regular trial --
>
> [Pro se employer:] Well, I'd prefer to work it out this way.
>
> [ALJ]: Well, let's see what we can do. . . .[339]

However, ALJs will vary in their approach to the conference phase of the simplified proceedings. The ALJ in the case above essentially converted the conference phase itself into an informal hearing, and decided the case on the basis of the conference, since the conference phase was already on the record.[340] Undoubtedly, other ALJs might have proceeded differently, for instance by concluding the conference phase earlier and having the parties present their cases more formally. Moreover, the ALJ in the above case probably would use a different approach under different circumstances.

Nevertheless, the key word and concept is flexibility. The ALJ can proceed with greater or less formality, as the case and the circumstances warrant.

Comparison of ALJ and DOL Perspectives

As might have been expected, the ALJs' outlook on simplified proceedings is considerably different from that of the Department of Labor attorneys. Generally, the differences are attributable to the very different institutional roles played by ALJs and trial attorneys. DOL attorneys are constrained by their prosecutorial role under a law enforcement model, with its burden of proof. They are representing a client, albeit a governmental, institutional client, so the adversary model is implicated in their role. ALJs serve as adjudicators, vested with considerable discretion, who are dispensing justice under the law. These different perspectives and viewpoints are not easy to reconcile.

These differences in perspective also are more than academic. Perspectives influence the actions, reactions, and policies of key participants in two crucial components of the OSH Act system. It seems worthwhile to consider the ways in which different aspects of simplified proceedings may be viewed from these different perspectives.

Most emphatically, however, neither perspective is "right." Neither is "wrong." They are merely different, because the institutional roles are different.

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[339] Transcript of Proceedings at 6, Dub Rose & Associates, 14 OSHC 1313 (1989) (No. 89-1128-S).

[340] Id. at 65.

(Except where specific attribution is made, the following paragraphs do not necessarily reflect express comments by particular individuals. However, they are intended to be, at the very least, a fair reflection of perspectives inferred and synthesized from information obtained during the course of preparing this Report).

At the outset of the case, when a request is made for simplified proceedings, the ALJ usually will have only the citation and notice of contest in a thin file. From the ALJ's perspective, the case may look very simple. There are three or four cited violations dealing with familiar subjects, perhaps machine guarding, electrical grounding, and guardrails. The DOL attorney should have a somewhat thicker file, including material from the client agency's investigative file and, perhaps, some past experience with the compliance officer(s) involved.

From the attorney's perspective, a decision must be made within fifteen days, or sometimes less. The attorney may have been in a hearing, out of town, when the request arrived on Thursday, and it is now Monday. The decision on the request must be juggled with the rest of the attorney's workload. After playing telephone tag for a day or two, the attorney talks to the compliance officer, who has just returned from inspecting a processing plant in Piggot. "Yes, the machine was being used. Well, the company had modified the original guard so as to speed up the cutting. Here's the problem with what they did . . . . " And so it goes.

In short, the DOL attorney is confronted with a request for simplified proceedings early in the case and the need for a response in a limited time frame. If time is available, and if the attorney is willing to invest that time in a fairly labor-intensive risk assessment (rather than simply starting to draft a complaint), any decision to agree to simplified proceedings still involves a calculated risk that unforeseen complications will not arise. The simplest, easiest, and safest course is a one-sentence letter objecting to the request. From the ALJ's perspective, a response time of 15 days probably seems ample for the attorney to make an informed choice in a facially simple case.

From the ALJ's perspective, OSHRC's simplified proceedings were designed to attract a class of "routine" cases. A party requests simplified proceedings; the Department of Labor vetoes the request; a sense of frustration results. From the attorney's perspective, the class of "routine" cases may be small or nonexistent, and certainly unpredictable. Someone else's frustration, and the goals of proceedings designed by another agency, are likely to be quite irrelevant.

A simplified proceedings case may be concluded several months sooner than a conventional case of similar magnitude. From the ALJs' perspective, all parties benefit from the more prompt adjudication of the dispute. However, from the perspective of an attorney, the ALJs may be seen as reacting to a simplified proceedings case with "let's set it on the trial calendar," and with some pressure to settle or try the case immediately, as a matter of clearing their own case dockets.

The attorney may view the practical similarities between conventional proceedings involving a pro se party and simplified proceedings involving a pro se party as reducing the need for, or significance of, simplified proceedings. From the attorney's perspective, the pleadings and any requests for admissions or interrogatories in a simple case should be simple enough for any literate pro se to understand. An ALJ may view the importance to a pro se party of his "day in court" as offsetting any benefits of pleadings and discovery in conventional proceedings where the issues, from the ALJ's perspective, are relatively simple. From the ALJ's perspective, pleadings and discovery in a simple case are more likely to be a pitfall for the pro se litigant than a benefit to the process. Indeed, some ALJs might form the impression that government attorneys veto requests for simplified proceedings as a tactical ploy, perhaps hoping that the pro se party will drop the whole matter.

An attorney may have formed the impression that simplified proceedings often are invoked by companies which wish to litigate "on the cheap," companies which can either afford an attorney or have company officials quite capable of handling a truly simple case, pleadings and all. To the attorney, the veto of a request for simplified proceedings will cause such employers to "get serious" about the case. From the ALJ's perspective, a pro se party, uncomfortable with unfamiliar written documents in "legal" form and language, often may abandon a potentially meritorious notice of contest with a sense of frustration and of being unfairly treated, after receiving the Complaint, and a Request for Admissions, or a set of 25 Interrogatories. In the words of one pro se respondent, "I got so many papers from OSHA, I don't know which is which and what is what."[341] It is easy for an ALJ to remember and be sympathetic with such a lament. However, from the attorney's perspective, the attorney is likely to remember the same pro se respondent who, at the hearing, when he finally did read the request for admissions, disagreed with only one or two, and stated as to the rest: "They are facts."[342]

Then there is the problem of a case where simplified proceedings have not been vetoed, but which turns out to be unsuitably complex, or which turns out to be one in which the pro se party is uncooperative about informal discussions to narrow the issues.

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[341] Transcript of Proceedings, at 7, Phillips Electric, Inc., 14 OSHC 1606 (1990) (Docket No. 89-0503).

[342] Id. at 8-11.

From the ALJ's perspective (probably), those situations can be dealt with under OSHRC's rules, which provide for a motion to discontinue simplified proceedings for cause and to resume handling the case under conventional procedures.[343] From the attorney's perspective, however, there may be some unwillingness to risk total reliance on the uncertainties inherent in obtaining such relief, especially when there is a pro se party and when such problems could have been avoided by vetoing the request for simplified proceedings in the first place.

Finally, at least for purposes of the present discussion, those who have given some thought to the matter, from either perspective, must consider the potential impact on caseload for the entire litigation system if there were a surge in the number of simplified proceedings. If the present veto were abolished, what would be the impact on the quantity--and quality--of workload? There would immediately be more cases, given about a 15% rate of requests for simplified proceedings. Would there be even more requests for simplified proceedings if requests were granted as nearly a matter of right? How many of those cases would involve valid disputes? How many would essentially be "ventilating?" How many would be invoked on a theory that the pro se party, or a company official, can invest profitably a half-day at a conference/hearing, where the respondent need prove nothing, the burden of proof is on the government, and at the very least, the penalty may be lowered?[344]

5. OSHRC "Guide to Procedures"

OSHRC itself has published recently an excellent revision of its booklet explaining its litigation procedures, "A Guide to Procedures."[345] (Hereinafter, Guide.) An individual who files a notice of contest receives a copy of this Guide with the notice of docketing. The Guide explains both conventional and simplified proceedings in terms as understandable as possible to the layman, with key or crucial aspects of the procedures often underlined, printed in bold-face type, or otherwise emphasized. There are several appendices with examples of pleadings, which make it a useful, but not definitive, form-book even for attorneys.

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[343] 29 CFR §2200.204 (1989).

[344] See cases summarized in Appendix A and listed in Appendix B for examples of cases where the penalty was lowered. In theory, a proposed penalty could be raised, but none of the simplified proceedings cases in Appendices A or B indicate on their face a higher penalty than originally proposed.

[345] OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION, A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (rev. Nov. 1988).

> There are cases that, though technically eligible for simplified proceedings, should not be considered for litigation under those proceedings. If you foresee the need to use discovery or to keep certain information confidential, you should not request simplified proceedings.
>
> When deciding whether to request simplified proceedings, ask yourself the following questions. If the answer to any of them is "yes," you probably should NOT request simplified proceedings.
>
> Question 1. Will the presentation of my case require me to obtain information in the possession of any other party?
>
> Remember: In simplified proceedings discovery is allowed only with the permission of the Judge and his ruling CANNOT be appealed until after the decision is issued.
>
> Question 2. If I do not intend to have an attorney, will I need the testimony of expert witnesses to establish my case?. . . .[346]

The Guide goes on to suggest other potential problems and to explain carefully the various steps involved in a simplified proceedings case. The party is reminded that any other party can veto the request for simplified proceedings. Most significantly, the Guide emphasizes that the parties are required to discuss the case informally, between themselves.

> [A]ll parties are to participate in a mandatory discussion. This mandatory discussion can be conducted in person or by telephone and is to be arranged by the parties themselves. . . . . Even if a settlement cannot be reached, the parties are required to attempt agreement on as much as possible regarding the case.
>
> The following topics must be discussed:
>
> (1) Narrowing of Issues.--The parties are expected to discuss the substance of the points on which they differ, called the issues, and to resolve as many of those issues as possible. The issues upon which agreement cannot be reached, and will therefore come before the Judge for decision, must be listed. The issues remaining to be resolved might include, for example, specific defenses to the citation . . . .
>
> (2) A Statement of Facts.--The parties are expected to agree on as many of the facts underlying the case as possible. For example: the size of the business, the safety history,

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[346] Id. at 17 (emphasis in original).

> (2) A Statement of Facts.--The parties are expected to agree on as many of the facts underlying the case as possible. For example: the size of the business, the safety history, details of the inspection, and the nature of the worksite as well as any machinery or equipment involved in the citation.
>
> (3) A Statement of Defenses.--You will be required to list any specific defenses you might have to the citation. You could, for example, argue that the condition in violation was the result of an employee acting contrary to a work rule that has been effectively communicated and enforced . . . .[347]

The effect of this Guide on the number and quality of simplified proceedings can not yet be determined. In some cases, it may make little difference. For example, a "truly small" employer may not read even the OSHRC Guide. Further, the respondent who merely wants to vent some frustration is not likely to study it carefully. But the Guide does offer an opportunity for a pro se party to make an informed request and places the party on notice that cooperation in narrowing the issues prior to any hearing is expected.

Perhaps even more significantly, this Guide comes at an opportune time, when there are indications that some DOL regional offices may be more favorably inclined toward simplified proceedings. The Guide may reflect, and provide the potential for, some common ground in the development of better consensus between the Department of Labor and OSHRC. There are equities and interests on all sides of the issue. OSHRC is an independent adjudicative agency. The Department of Labor is the investigative and prosecutorial arm of the system. Differences between the two are inevitable, because they play very different institutional roles. But the differences should not be multiplied by needless friction. Coupled with the factors and variables considered by those DOL offices and attorneys who are more receptive to agreeing to requests for simplified proceedings, the factors recognized in the OSHRC Guide could provide the nucleus for further development.

6. Summary Analysis & Synthesis: Incentives & Impediments

In a nutshell, several external factors have affected the use of simplified proceedings, and the interaction of these external factors with the nature of simplified proceedings has the net result of providing many incentives for Department of Labor attorneys to veto them, and few incentives to use them. However, this nutshell summary oversimplifies the situation, so a recap of sorts is warranted.

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[347] Id. at 19-20 (emphasis in original).

Several external factors have affected the use of simplified proceedings since they were established. The Department of Labor's implementation in 1980 of informal prenotice of contest conferences, coupled with a dramatic decline in the number of cases contested before OSHRC, reduced the market for simplified proceedings from the very beginning. The availability of an informal conference with Deparment of Labor area officials served some of same purposes as OSHRC's simplified proceedings. An employer could discuss the matter, and reach some accommodations, in a conference setting.

In 1986, new OSHRC procedural rules applicable to conventional proceedings altered the context in which the decision is made to request or veto simplified proceedings. At least on the face of things, the stakes became different, and the consequences of agreeing to simplified proceedings changed. The parties would give up any benefits that might result from hybrid fact-pleading and several forms of discovery as a matter of right.

In the meantime, doctrines and precedents regarding the Department of Labor's burden of proof and an employer's affirmative defenses had been developing in the traditional, incremental, case-by-case manner. By 1986, enough of these had crystallized to make fairly clear that simply showing up at hearing with the compliance officer often would be insufficient to prove a case.

All along, the occupational safety and health standards had been a mixed bag--some relatively precise, many rather open-ended and violated, for example, only upon some showing of state of the art, industry practice, or employer knowledge, actual or constructive. As precedents accumulated on the more "general" standards, a compliance officer's direct observation of workplace conditions often was only the beginning, not the end, of determining whether a violation of such standards had occurred. Actual experience with litigation under simplified proceedings seems to confirm the vicissitudes of proof under many standards.

All along, most of the requests for simplified proceedings came from pro se employers. Apart from the general problems which can arise when dealing with a pro se party, simplified proceedings severely curtailed any right to obtain information, which may be needed, from that party prior to the hearing.

The interaction between these external factors and the rules governing simplified proceedings reduced the incentive to agree to simplified proceedings. Any decision to agree to simplified proceedings must be made at an early stage of the proceedings, when the amount of information is at its lowest point. Obtaining preliminary information from a pro se party can be labor-intensive at best. Once committed to simplified proceedings, there was a theoretical possibility of moving to revert to conventional proceedings. But the outcome of such a motion would be, to say the least, uncertain. That uncertainty offered no incentive to incur the risk of unnecessary complications in extricating oneself from a situation which could have been avoided by simple veto in the first instance.

To a certain extent, many of these considerations became informally internalized by the prosecutorial arm, which had never been particularly enthusiastic about simplified proceedings anyway. The pure veto rate initially was nearly 40%,[348] and even before 1986 probably went much higher. Yet, on the other side of the coin, that same veto rate indicates a fair number of early cases where simplified proceedings were not vetoed. There seems to have been an early period of some willingness at least to experiment with simplified proceedings. That willingness evaporated.

For the most part, a rather strong presumption against agreeing to simplified proceedings became the norm, and probably rather quickly. From the attorney's perspective, factors and variables against agreeing to simplified proceedings ordinarily outweigh those in favor of agreeing. Experience with conventional proceedings involving pro se parties was likely to reinforce the attorney's perceptions. Furthermore, if the parties bi-laterally wanted to simplify the proceedings, formal invocation of simplified proceedings was unnecessary.

The incentives for agreeing to simplified proceedings, until recently, have been minimal. However, with an increasing number of contested cases, simplified proceedings may become slightly more attractive, in direct proportion to caseload. Certainly, simplified proceedings are an attractive option to the informed pro se employer. They could become more so to the prosecutorial arm if gradually expanded use proves to be cost-effective and does not compromise the professional responsibility of representing effectively the governmental client.

7. Concerns for the Future

A tentative trend is discernible. However, even if the prosecutorial arm becomes, at least piecemeal and under the pressure of workload, more amenable to simplified proceedings, the use of simplified proceedings should not depend entirely on the ebb and flow of workload.

Three concerns need to be discussed at this point. The first is one which exists at a practical, more immediate level. The other two are more basic and fundamental.

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[348] See text at notes 221-24.

Sometimes they do. Sometimes they may not even occur. If the number of simplified proceedings cases increases, enforcement of this rule would seem to be of more than minor significance. Although some ALJs take affirmative measures to police the requirement, others may not. OSHRC's Guide emphasizes the importance of these informal discussions. This is a good start. But there is a need to be alert to potential problems.

Mainly there is the two-fold problem of the recalcitrant and uncooperative pro se party, on the one side, and the inert attorney, on the other side, who makes little or no effort to comply with the rule. Neither should be coddled. If the parties agree to use simplified proceedings, they should follow the few but important rules for narrowing disputed issues. Attorneys who make no effort to contact the opposing party should suffer the professional consequences. Attorneys who discover the uncooperative side of a pro se party in simplified proceedings should be able to move for, and get, reversion to conventional proceedings. Although the relevant OSHRC rule may not expressly require a party to be cooperative, the requirement to confer and discuss seems to imply some element of good faith effort.[349] One encounter with one uncooperative pro se party, and one indifferent response from one ALJ to complaints about lack of cooperation, could be enough to sour an entire regional office on simplified proceedings for another ten years.

b. Basic Concepts

There are at least two deeper problems which must be considered if simplified proceedings are to be used optimally and to their full potential. The first centers about the purpose and goals of simplified proceedings. The second involves the murky threshold question of what kinds of cases are suitable for simplified proceedings.

8. The Purpose of Simplified Proceedings: Cost Effectivness or "Simple Justice"?

From the very outset, there has been a kind of dual vision of simplified proceedings. One view, reflected by former Commissioner Cleary's article, and many ALJs, focuses on concerns for the pro se party's "day in court," and tempering the adversariness of an inherently adversarial situation.[350] The other is reflected by the "official" goals, basically cost-savings or cost-effectiveness, expressed in the formal rulemaking process.[351] While not mutually exclusive, two visions are not synchronous. The purposes of simplified proceedings butterfly between the official cost-savings goal and the unofficial concern for pro se parties.

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[349] 29 CFR §2200.206 (1989).

[350] Cleary, Pleading and Practice Before the Occupational Safety and Health Review Commission, 24 LAB. L. J. 779, 787 (1973).

The official purpose seems to focus on holding down the "costs" of litigation: eliminating unnecessary paperwork, reducing expenses to the parties and the Agency, making adjudication less complex and time consuming,[352] saving "time and expense while preserving fundamental fairness."[353] While worthy goals, they apply with equal theoretical force to all kinds of parties. The "official" idea is that simplified proceedings can be used in "routine" cases where the benefits of hybrid fact pleadings and discovery are minimal, whether a party is pro se or not. The "official" purpose focuses on efficiency--providing a forum where parties address the dispute without a lot of legalistic chrome, bells, and whistles.

The unofficial purpose, not forcefully explicit in OSHRC's formal explanation of its rulemaking, is "simple justice"--a two-fold legitimate concern: (1) consideration for pro se parties for whom the costs of an attorney genuinely are not feasible in a relatively small case, and for whom even relatively simple adversarial pleadings and litigation are an intimidating handicap; and (2) reducing the adversariness of an inherently adversary system patterned on the law enforcement model. However, the "official" justifications for simplified proceedings downplayed and obscured the element of simple justice. Any reference to "pro se" parties was indirect and left-handed. "It is hoped that the procedure is simple enough so that parties need not necessarily retain legal counsel to guide them through what might appear to be complex procedural rules."[354]

On the one hand, if the purpose is cost-effectiveness, simplified proceedings appear to be a blunderbuss means to reduce the costs of litigation. Simplified proceedings operate in close to an all-or-nothing fashion. True cost-savings or cost-effectiveness probably involves more than eliminating some paperwork. For one thing, parties who are represented by a competent lawyer or who have experience in dealing with the OSH Act system can trim their costs in ways more carefully tailored to the needs of a particular case, without invoking simplified proceedings. Most truly simple cases should "self-simplify," to a certain extent. For another, eliminating pleadings and discovery of right can be a false economy. Complex procedures have been cast as something of a villain throughout the simplified proceedings scenario. The casting has some validity, because procedures which are unnecessarily complex, relative to the issues, can be pure waste. However, procedural requirements are not always mere niceties and technicalities. The simplest disputes can take on a very complex hue when an ALJ hears them for the first time at a conference/hearing.[355] Complex issues and disputed facts do not become simpler to resolve merely because pleadings and discovery of right have been discarded. The false economy of being penny-wise and dollar-foolish comes to mind, as do throwing out the baby with the bath water and the man who merely started out to drain the swamp. OSHRC's own Guide quite appropriately counsels caution in requesting simplified proceedings.[356] So, the cost-savings achieved under simplified proceedings in truly simple cases may be marginal, if costs to the entire system are taken into account. In any event, the actual cost-savings or cost-effectiveness of simplified proceedings does not appear to have been the subject of any meaningful, systematic cost-benefit, or other, analysis.

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[351] 43 FR 36855 (August 18, 1978); 44 FR 70112 (December 5, 1979) (29 CFR §2200.200 (1989).

[352] 43 FR 36855 (August 18, 1978).(Notice of proposed rulemaking.)

[353] 44 FR 70112 (December 5, 1979); 29 CFR §2200.200 (1989).

[354] 43 FR 36855 (August 18, 1978) (explanation accompanying proposed rulemaking).

On the other hand, if the purpose is "simple justice," to assure a "day in court" for the unsophisticated, small, pro se party of limited means, then simplified proceedings are overinclusive. Simplified proceedings indiscriminately embrace parties with lawyers, relatively sophisticated pro se parties who have marginal need for simplified proceedings in a truly "simple" case (the only kind which is supposed to be in the simplified proceedings mode anyway), and pro se parties whose "day in court" may be jeopardized, even in a truly simple case, if reasonable allowances are not made.

Again, the pro se population is diverse. The continuing substantial percentage of pro se parties in conventional proceedings, as reflected in the reported cases, seems to compel a conclusion that some pro se parties, with proper and appropriate consideration from the ALJ, are quite capable of litigation before OSHRC in conventional proceedings in a truly simple case. For them, simplified proceedings would be a convenient cost-cutting or time-saving device, rather than a necessity. Fostering a litigation atmosphere conducive to pro se parties is commendable. Reducing the adversariness of an inherently adversary system statutorily patterned on the law enforcement model is admirable. But making the process merely congenial to the economy-minded bargainhunter is another matter. Making a process too inexpensive can cheapen it, lowering quality, increasing demand, and losing sight of the purposes of the process.

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[355] Although ALJs contacted for this study indicated few or no "simple" cases which went topsy-turvy at hearing, it must be remembered that ALJs with recent experience in simplified proceedings cases have presided, by and large, over cases which should have been screened very carefully. See Appendix C.

[356] See text at note 346, GUIDE at 17.

No matter how obscured the purposes of the OSH Act may become in the tangle of the law enforcement model, OSHRC is not a small claims court designed to accommodate pro se parties disputing over return of a rent deposit, a minor traffic mishap, or a ruined shirt.[357] Much more can be at stake. Even though a defective ladder may seem trivial, somebody can get hurt if it is not corrected. For most of us, the only way to get our attention is to impose some costs.

As to the reduction of adversariness, the conference/hearing format can be a helpful tool in resolving the dispute, rather than just "adjudicating" it.[358] However, the key factor in taking the edge off of adversariness is not the format of the proceedings. The parties, and to a large extent, the ALJ are much more significant factors than procedural format. A pretrial conference in conventional proceedings can serve the same purpose as the "conference" phase of simplified proceedings. An astute ALJ attuned to the dispute resolution model is not limited to simplified proceedings.

The present situation is mildly anomalous. On their face, simplified proceedings apply without regard to pro se status, but it is the pro se party who usually invokes them, and the small, unsophisticated pro se party who most needs them. OSHRC ALJs and DOL attorneys know that the main beneficiaries of simplified proceedings are the pro se parties, for better or worse. They know that in actual practice, conventional proceedings involving a pro se party sometimes are not radically different from simplified proceedings. However, the handling of cases involving the pro se party will vary from ALJ to ALJ.

Yet, if confined to tinkering with simplified proceedings, the alternatives seem limited. To date, the absolute veto has allowed easy conclusions to be asserted about "underutilization" of simplified proceedings. How much true underutilization there is, and how many genuinely "simple" cases arise under the OSH Act system, remain to be seen. Going to the opposite extreme, a near-absolute right to simplified proceedings on request, inevitably would increase the number of simplified proceedings. The impact on workload and the quality of adjudication is unpredictable in detail, but a fundamental tenet of economics seems to be that lowering the cost of something increases the demand. Opting for discretion in the ALJs has its own problems. Certainly, unbridled discretion would be questionable. Vesting authority in ALJs pursuant to some verbal formula or "test" requires the formulation of that "test." As will be discussed in the next section of this Report, this involves some fundamental questions which OSHRC has been able to avoid thus far. To a large extent, OSHRC and its ALJs have been insulated from some difficult choices and problems by the very exercise of a veto power which is easy to criticize, but for which a substitute may not be easy to develop.

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[357] See, R. Kulat, et al.: Hairy Tales from Chicago's Pro Se Court Where You Don't Need a Lawyer to Help Solve Life's More Vexing Problems, 13 Student Lawyer 14 (Sept. 1984).

[358] See, e.g., Transcript of Proceedings, Lone Star Corrugated Container Corp., (Docket No. 89-2119)(January 4, 1990) (case apparently unreported because settled; abatement of machine guarding violation worked out at conference); Transcript of Proceedings, Dub Rose & Associates, 14 OSHC 1313 (1989) (No. 89-1128-S).

The time may have arrived for OSHRC to consider some more pioneering, as it did with Settlement Judges and simplified proceedings themselves. As previously emphasized, simplified proceedings are indiscriminate, overinclusive, and simplistic in their approach, requiring essentially an all-or-nothing choice at the very outset of the litigation. While they also have their positive points, and certainly should not be discarded, there is serious question as to whether they are an optimal means to assist the small, pro se party. Certainly, they are an indirect means.

If the most important goal is to enhance the small pro se party's opportunity for a "day in court," then tinkering with simplified proceedings may be a dead end. An alternative worth considering is to by-pass simplied proceedings, as such. It could be possible to take a more direct approach to the problems of the small pro se party, who is genuinely unable to afford an attorney to contest a small penalty case, with small abatement costs, and who is genuinely handicapped in dealing with conventional proceedings.

Given the substantial percentage of pro se cases in the system anyway, the time may have come for OSHRC, and the Department of Labor, to address the problems of the pro se party more directly. True enough, there are very few "models" available. Pro se's are a very neglected feature of our legal system; indeed, they are barely tolerated. Yet OSHRC established the SJ procedures at a time when nobody had much experience with SJs. OSHRC and the Department of Labor have a long history of experience with pro se parties. That experience may not always have endeared pro se parties to the DOL lawyers, but there is a great deal which they and OSHRC's ALJs may be able to teach other agencies, and the rest of the legal system.

Literature and "models" on pro se cases are limited, but some are available, and with the momentum generally for ADR, more will appear. OSHRC's "Guide," moreover, is an excellent start, at least for the relatively sophisticated pro se party. Special pro se rules could be triggered by objective criteria, such as the number of employees, number of alleged violations, classification of the violations, and amount of proposed penalty. Possibly, pleadings could be modified, instead of eliminated, for some categories of pro se parties or cases. The "paperwork" could be simplified and stripped of legalese, hopefully simpler than the recent census forms. In one state court jurisdiction, preprinted form pro se complaints, with space for necessary information to be written in, are available for simple contract disputes.[359] Although such forms are not directly applicable to "answers," they suggest possibilities. After all, if the case is truly simple, with only two or three simple alleged violations, the difficulties of framing a "form answer" could be managed. "Mr. Jones, we want to know more about your problem with OSHA. Why do you think they're wrong? Below are several questions, with space after each question, for any answer you would like to make. (1) Are you claiming that there wasn't a violation? If so, please explain. (2) Are you claiming that the citation involves conditions which were not your fault? If so, please explain . . . ." OSHRC and the Department of Labor perhaps might collaborate on the development of some kind of "form answer."

If OSHRC wants to be more venturesome, it might consider a recent innovation in workers' compensation cases. In at least one state, provision is made for a pro se claimant to "confer with a legal advisor on the staff of the [Workers'Compensation Commission] . . . ."[360] Additional OSHRC staff and an "800" number might be a sound investment, if it were carefully handled, and led to better-informed pro se parties.

At the very least, addressing the pro se party's problems directly would have the virtue of focusing on those problems, rather than lumping them in with cost-savings goals and generalizations. The problems of the pro se party deserve more direct attention. Continuing to subsume them under simplified proceedings may not do justice to either the pro se party or simplified proceedings.

9. Carts and Horses: Cases Suitable for Simplified Proceedings

Little systematic attention has been paid to the crucial threshold question of what makes a particular case "simple" and therefore suitable for simplified proceedings. To say that a case is simple because the parties don't need fact-pleadings and discovery as a matter of right is flagrant question-begging. Likewise, this Report must ignore the temptation to offer a definition such as: "A simple case is one which turns out not to have any complications."

At an abstract level, the type of case which is suitable for simplified proceedings may be easy to describe: the routine case, involving a few other-than-serious violations, low penalties, with the facts at issue provable by "occurence witnesses," with little need for "expertise" or expert testimony, and, preferably, a hazard which essentially has been mooted. Added to these elements should be a factor which OSHRC recognizes in its Guide: whether presentation of the case will require information in the possession of any other party.[361] Put them together and we have a nice, academic litmus test worthy of a law journal.

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[359] H. Rubin, The Civil Pro Se Litigant v. the Legal System, 20 LOYOLA U. OF CHI. L. J. 999, 1010 (1989)(court in Cook County, Ill.).

[360] ARK. CODE ANN. §11-9-703 (1987).

However, the number of alleged violations to which the above criteria would apply in the "real world" remains to be seen. The amount of proposed penalty, the number of alleged violations, and classification of the alleged violation are simple enough. But crucial problems arise from the nature of many OSHA standards and the statutory imposition of a law enforcement model, with its burden of proof. Although noncompliance with some standards can be established by simple observation and measuring, noncompliance with many other standards involves a much larger zone of potential dispute.[362]

Quite possibly, a very large cart may have been put before a small horse. Essentially, OSHRC decided how to simplify, but was overall rather vague on what to simplify. What is it that makes a case suitable for simplified proceedings? What kinds of cases are suitable for a procedural regime which eliminates pleadings and discovery as a matter of right? Simplified proceedings' answer (or nonanswer) to such questions has been, thus-far, to: (1) establish a procedural regime eliminating pleadings and discovery of right; (2) exclude certain categories of cases wholesale (i.e., cases arising under the general duty clause and certain "health" standards); and (3) leave the rest up to agreement by the parties.

As previously suggested,[363] simplified proceedings cannot by themselves simplify issues and factual disputes which are not simple. The procedures (or nonprocedures) in simplified proceedings may be the cart which has been put in front of the horse. The horse may be small, because the number of cases suitable for simplified proceedings over the objections of a party may be limited. (If both parties agree to use simplified proceedings, of course, that is an entirely different matter.[364]) Even if the horse were made larger, as by eliminating the present veto power, the cart would still be in front of the animal. Legal and factual issues do not obligingly go away just because the procedural rules dispense with pleadings and discovery as a matter of right. A good lawyer, or a good litigator (pro se or not) does more than maneuver a course through procedural niceties. A good litigator must be prepared on the facts and merits of the case.

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[361] See text at note 346.

[362] See text at notes 269-83.

[363] See text at note 307, 355.

[364] Yes, one could say that mutual agreement involves a horse of a different color.

Again, very little systematic attention has been paid to the threshold question of what constitutes a case which is suitable for simplified proceedings. OSHRC rules and rulemaking imply a few hints here and there. At one extreme, general duty clause cases, and certain generic kinds of cases arising under certain "health" standards, have been made categorically ineligible for simplified proceedings.[365] The rationale for the "health" standard exclusion has been, and more or less continues to be, the presumed or inherent complexity of cases under those standards. Most, if not all, of the excluded health standards "require engineering controls as a primary method of abatement and require personal protective equipment as a secondary measure. Cases involving such standards are unusually complex and involve a certain amount of necessary discovery."[366]

Beyond the categorical exclusions, vagueness prevails. In the explanatory statement accompanying the experimental, one-year rule which first established simplified proceedings in 1979, OSHRC's response to comments objecting to the limitations on discovery and interlocutory appeals was, "It is expected that simplified proceedings will be used in cases where the factual and legal issues are relatively uncomplicated."[367] To the very significant point that many cases arising under non-"health" standards might likewise be too complex for handling under simplified proceedings, OSHRC responded: "[OSHRC] recognizes that many nonhealth cases may be too complex for simplified proceedings, but is confident that the right of any party, including the Secretary, to preclude simplified proceedings in such case is an adequate safeguard at this time."[368]

Therefore, it is obvious that OSHRC has recognized the unsuitability of many cases theoretically eligible for simplified proceedings. However, it has not gone much further. Subsequent rulemaking has not refined or clarified the concept of what kinds of cases are suitable for simplified proceedings.[369] The apparently aborted proposal to hinge everything on "due process" certainly represented no refinement or clarification.[370]

Overall, OSHRC seems implicitly to have recognized the difficulties of providing by rulemaking an alternative to the present scheme. To a suggestion that the objecting party be required to state a reason for its objection, OSHRC responded: "Such a requirement would be likely to lead to litigation over the validity of the reasons given and delay the progress of cases."[371] OSHRC might well have added, "And besides, what reasons would be acceptable, under what principles and criteria? How do we write the rule? What guidance do we give ALJs and the parties?"

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[365] 29 CFR §2200.202 (1989).

[366] 43 FR 36856 (August 18, 1978).

[367] 44 FR 70110 (Dec. 5,1979) Explanatory Statement Accompanying Final Rule) (emphasis added.)

[368] 44 FR 70109 (emphasis added).

[369] See, 47 FR 29525-26 (July 7, 1982) (explanatory statement accompanying amendment of rule.)

[370] See text at notes 244-55.

OSHRC to date has maintained a shaky status quo: certain broad categories of cases are ineligible, and the rest is up to the agreement of the parties. The status quo is not without advantages: (1) it is simple to administer because OSHRC and its ALJs do not have to become embroiled in drawing fine lines between cases which are "relatively simple" and cases which are unsuitably complex for simplified proceedings; (2) it essentially moots the need for any rules or criteria which attempt some "test" for suitability of a case for simplified proceedings; (3) it allows the parties to make an informed decision in the first 25 days after docketing--if they truly want to make an informed determination--that from their own perspectives, they both conclude that the case is suitable for simplified proceedings; (4) it promotes simplified proceedings as a form of ADR by establishing a consensual regime, rather than a proceeding imposed at the unilateral will of one party or the decision of a third-party adjudicator.

The status quo is not without disadvantages, however. The main disadvantages of the status quo are "underutilization" and the dissatisfaction provoked among pro se parties, or would-be pro se parties, by frequent use of the veto.

However, the number of cases in which simplified proceedings would be suitable is uncertain, so "underutilization" may not be the proper word. Criteria for suitabililty are almost nonexistent. Many factors and variables pointing in the direction of veto, or unsuitability, exist. Even in the one Regional Solicitor's office with a long history not only of agreeing to, but also requesting simplified proceedings on behalf of the government, the use of simplified proceedings is hardly at a wholesale level. The dissatisfaction among pro se parties may need to be addressed by means more direct, and more tailored to the needs of pro se parties, than simplified proceedings.

None of this necessarily compels a conclusion that the status quo should be maintained. However, if changes are to be made in the rules for simplified proceedings, it would seem necessary, as a condition precedent for any changes, to develop a better idea of what kinds of cases are suitable for simplified proceedings.

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[371] 47 FR 29526 (July 7, 1982) (explanatory statement accompanying amendment of rules.)

V. Overall Conclusions

A. Settlement Judges

The Settlement Judge (SJ) procedures are working well. Some of the cases in which SJs have been used are virtual textbook examples of how the process should work. Concerns about the relatively small number of SJ cases thus far may be premature. The main reason for any under use of SJs lies primarily in the novelty of the procedure, lack of knowledge of its very existence, and lack of alertness to possibility for its use among those who are accustomed to bilateral negotiations in a system where there has been, historically, a 90% settlement rate. To use an SJ is to use an extraordinary procedure, so the number of SJ cases should be relatively small. The main potential problem with SJs lies not in under use, but potential overuse, and even abuse. Overuse could develop, straining OSHRC's resources, if SJs were invoked short of true impasse. Abuse could occur, for instance, because the "preview" feature might be very attractive to a lawyer who is alert to the potential of a free "mock jury."

B. Simplified Proceedings

Simplified proceedings probably are underutilized. However, the degree of genuine underutilization is indeterminable, under present circumstances. A fair assessment regarding underuse can only be made if there is some clear concept of, or consensus on, what makes a case suitable for simplified proceedings. It is distinctly possible that the universe of cases objectively suitable for proceedings which eliminate pleadings and discovery as a matter of right may be relatively small, given, among other things: (1) the OSH Act's law enforcement model and the appropriateness under that model of a fairly strict burden of proof, (2) the large number of "general" or open-ended standards, (3) the number of affirmative defenses, and (4) the number of cases which hinge on evidence and information in the possession of one party.

Two major steps or decision points seem necessary. First, the goals and purposes of simplified proceedings must be more clearly settled. Is the main goal cost-effectiveness? If so, then calculate the costs, all of them, in all parts of the system, OSHRC, the prosecutorial arm, employers, employees, and the public. If the most important goal is to provide fair treatment for the small pro se party with a small case, then the question arises whether simplified proceedings are the optimal way to reach this goal, or whether the problems of the pro se party should be treated more directly, by rules dealing with pro se's as such.

Second, OSHRC and DOL and all others concerned, need to develop a more clear picture or idea of what kinds of cases are suitable for simplified proceedings. It is not enough to conclude that some cases do not need hybrid fact-pleadings and discovery as a matter of right, and leave it at that, unless the status quo is deemed to be satisfactory.

Recommendations:

1. DOL should encourage Regional Solicitors to selectively and carefully experiment with simplified proceedings. A broader base of experience, carefully tracked and analyzed, could be beneficial in either of two ways. First, if experience is satisfactory, more efficient case processing could result from careful use of simplified proceedings in the future. Second, if experience is unsatisfactory, there will be data and a basis of recent experience justifying use of the veto.

2. OSHRC AND DOL both should consider developing rules and policies pertaining to cases involving pro se parties, especially pro se parties of limited means in simple cases involving few violations and low penalties.

3. OSHRC should consider ways in which to make the informal discussion provisions presently "required" by 29 CFR §2200.206 more effective. As it stands, these informal discussions are the only substitute for hybrid fact-pleadings and discovery as a matter of right. OSHRC's "Guide to Procedures" sets the proper tone. The rules and their enforcement should follow suit. Although parties cannot be made to reach any particular result, good faith contact and discussion should be a condition precedent to further proceedings. For instance, complete failure to cooperate in the informal discussions should be express grounds for reverting to conventional proceedings, or other sanctions.

4. To the extent feasible and allowable under applicable law, future major OSHRC rulemaking on simplified proceedings should be preceded by some form of advisory committee studies. Or, "negotiated rulemaking" might be considered. Purely in-house committees composed of ALJs and OSHRC officials are undoubtedly competent, but they are in-bred. They bring largely the OSHRC, adjudicative perspective. They do not bring to the crucial formative stages of rulemaking the perspective of all participants in the litigation process. Those representing major principals are reduced to reacting

to a written proposal. Among those who might serve on advisory or developmental committees are representatives from DOL, employer associations, the relevant American Bar Association committee(s) and unions. In any event, pure notice-and-comment rulemaking may be insufficient if major changes are being considered or developed.

Report for Recommendation 90-7

Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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Among the many interactions of the political branches of our national government, perhaps none is more important than the routine sharing of information between congressional committees and administrative agencies. The quality of Congress' legislative and oversight work often depends on agency information. Yet, the executive is adamant that, in many contexts, its ability to control the information available to it is critical to the fulfillment of the executive's constitutionally vested functions. The process of information exchange--demand, response, possible negotiation and disclosure--is therefore central to each branch's agenda.

The success of interbranch information exchange is very difficult to assess. There is no obvious way of determining in any particular case whether the information provided to or withheld from Congress is optimal given the public interests involved. There is no obvious way to gauge the negotiating efficiency of the branches in resolving contested cases. There is uncertainty even whether the branches are honoring their respective legal obligations because little clear law exists to govern interbranch disputes over information, and each elected branch interprets the governing principles very differently from the other.

Much of Part I and of Part II, A-3 and A-4, below--the doctrinal analysis of executive privilege and the factual accounts of executive privilege disputes involving James Watt and Anne Gorsuch--appeared in Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

Despite these obstacles, some helpful generalizations are possible. It is possible, that is, to suggest some broad substantive guidelines that could help foster a degree of disclosure or withholding likely to be consistent with the interests of both branches, and of the public. Likewise, procedural steps are available to enable the branches to reach agreements more efficiently than they now do in some disputed cases. Because law operates in this area under the dominant shadow of politics, it would be foolish to overestimate the utility of rule prescription and legal process in mitigating undue tension between the branches in the information exchange process. Some progress is possible, however, and improvement in this area might yield benefits with respect to other aspects of the interbranch relationship as well.

To understand both the limits and the potential of reform, it is important to focus on the information exchange problem from two distinct angles. Part I below reviews the law in this area--not only to clarify what rudimentary doctrines exist, but also to explain the unlikelihood that much more authoritative law will be forthcoming. Part II reviews institutional practice, which, although mindful of law, is also distinctly political. An analysis of clearly successful negotiations, as well as negotiations that were less obviously constructive, suggests both the likeliest sources of tension between the branches and some helpful avenues for agreement.

Part III assesses a variety of possibilities for reforming the current processes of negotiating disputes and testing disputed claims of privilege against Congress. Part IV considers the applicability of the reform analysis to demands for information from so-called "independent agencies." The conventional wisdom in our capital city--that Congress' entitlement to information or the appropriate degree of disclosure varies between "independent" and "executive" agencies--makes little sense on either constitutional or policy grounds.*

I. The Background of Legal Uncertainty

As in other separation of powers contexts, the Constitution operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Nothing in the Constitution expressly refers to Congress' entitlement to information or to an executive prerogative to withhold. Nor have judicial opinions gone very far in elaborating the law. As a result, the Constitution provides less a set of clearly understood rules than a rhetorical framework within which each branch articulates its asserted right to demand or to withhold information.[1]

Congress' institutional view of its right to demand executive branch information is easy to summarize.[2] Congress insists it has plenary authority to demand executive branch information in connection with any properly authorized legislative activity. Thus, for example, the Freedom of Information Act, which exempts large categories of executive branch records from mandatory public disclosure expressly disclaims the application of those exemptions to Congressional demands for information[3]--including the exemption generally recognized as protecting documents that the executive branch deems to be covered by the generalized deliberative privilege that is perhaps the largest subspecies of executive privilege.[4] The opinions of congressional counsel assert additionally that no information generated at a staff level is properly subject to any executive privilege whatever.[5] Moreover, they recognize no limitation as to the subject matter of information that Congress properly may demand--even information relating to foreign relations, including international negotiations, is within Congress' purview.[6]

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*This study benefited greatly from the comments of those present and former employees of Congress and of the executive branch who agreed to be interviewed for the paper. A list of those willing to be acknowledged as interviewees appears as an appendix. Of course, the conclusions I present are mine, not necessarily theirs. I am also grateful for the research assistance of Paul Goddard, Iowa '92.

[1] A helpful general synthesis of law and practice in this area is J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988).

[2] Helpful general presentations of Congress' view include R. EHLKE, CONGRESSIONAL ACCESS TO INFORMATION FROM THE EXECUTIVE: A LEGAL ANALYSIS (Congressional Research Service Rept. No. 86-50A) (Mar. 10, 1986), and Office of Senate Legal Counsel, Draft Memorandum re: Congressional Oversight of the Department of Justice (Feb. 1986) (on file with author).

[3] 5 U.S.C. 552(c).

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[4] 5 U.S.C. 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear . . .."). For a review of the general contours of the doctrine surrounding invocation of deliberative privilege in court, see Weaver and Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989). The justification for such a privilege is attacked vigorously in Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L. J. ___ (1990) (forthcoming).

[5] Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives to Hon. John Dingell, re: Attorney General's Letter Concerning Claim of Executive Privilege for Department of Interior Documents [hereinafter cited as *House General Counsel's Watt Memorandum*], *reprinted in Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st and 2d Sess. 109 (1982) [hereinafter cited as *Watt Contempt Hearings*].

Congress' refusal to recognize a privilege for staff documents extends to attorney work product. Memorandum from Morton Rosenberg, American Law Division, Congressional Research Service to Subcomm. on Oversight and Investigations of the House Energy and Commerce Comm. re: Assertion of Claims of the Attorney-Client and Work Product Privileges Before a Congressional Committee (Feb. 28, 1989). It has even been argued that courts should refuse to recognize an attorney-client privilege for government entities. Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L. J. 1725 (1988).

[6] *Watt Contempt Hearings*, *supra* note 5, at 116-117; Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives to Hon. Elliot H. Levitas, re: Attorney General's Letter Concerning Subpoena For Documents to Administrator of Environmental Protection Agency [hereinafter cited as *House General Counsel's Gorsuch Memorandum*], *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 58, 61-63 (1982). This is not to say that Congress denies the importance of withholding certain executive branch information from the public, only that it denies the executive branch's authority to regard dissemination to Congress as public disclosure. Congress does regard itself as bound to provide for the nondisclosure of information, the dissemination of which would compromise national security. *Id.* That responsibility may obligate a congressional subcommittee, for example, to respect a good faith executive branch demand that it receive sensitive information only in "executive session." *See* Senate Standing Rule XXIX(6), *reprinted in* S. Doc. No. 1, 98th Cong., 1st Sess. 61 (1984); House of Representatives Rule XLVIII(7), *reprinted in* H.R. Doc. No. 271, 97th Cong., 2d Sess. 692-696 (1983). However, the authority to disclose publicly such information as a committee receives in executive session would reside in the committee, never in the executive branch.

The contrasting executive view is likewise straightforward. For the last 20 years at least, an executive branch doctrine of executive privilege has been embodied explicitly in presidential documents. On March 24, 1969, President Nixon issued a general memorandum to the heads of executive departments and agencies concerning congressional demands for information.[7] The Ford and Carter administrations left this policy intact, and a 1982 redraft by President Reagan left untouched the core principle of that memorandum.[8] That principle

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This rendition of Congress' doctrine vis-a-vis executive privilege may appear at odds with the various occasions on which subcommittees have acceded to executive insistence on nondisclosure. *See generally*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, re: History of Presidential Invocations of Executive Privilege Vis-a-vis Congress (Dec. 14, 1982), *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 90 (1982); Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, re: Refusals by Executive Branch Officials to Provide Information or Documents Demanded by Congress (Jan. 27, 1983); SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS, 1964-1973 (Comm. Print 1974). Those occasions, however, do not represent any unambiguous concession to the authority of the executive branch to withhold. Even Congress' insistence that it is empowered in every instance to demand and receive executive branch information would not require Congress to stand on its asserted authority at every opportunity. It can only be said with confidence that there are many instances in which Congress' calculation of its own interests, its confidence in the President, and the asserted interests of the executive branch permit it to accommodate the executive branch, whatever Congress' view of underlying principle. *See, e.g.*, Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975).

It is likewise true that the executive branch's willingness to submit to Congress information that might have been protected under a privilege claim does not gainsay the executive branch's asserted authority to claim privilege. *See generally* Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J. L. & POL. 183 (1986). The difficulty that is posed for Congress when it acquiesces in an executive branch insistence on secrecy, or for the executive when it acquiesces in a congressional demand for information, is justifying nonacquiescence in other instances depending on their facts. Thus, one House Judiciary Committee criticism of the executive branch's handling of the EPA dispute discussed below is that the executive branch failed to explain how the information it sought to withhold differed from earlier EPA information that had been voluntarily released. H. R. Rep. No. 435, 99th Cong., 1st Sess. 28-31 (1985).

[7] Memorandum from the President for the Heads of Executive Departments and Agencies Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 29, 1969), *reprinted in Executive Privilege--Secrecy in Government: Hearings on S. 2170, et al. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 207 (1975).

[8] Memorandum from the President for the Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted at* H.R. Rep. No. 435, 99th Cong., 1st Sess. 1106 (1985).

is that the executive branch "has an obligation to protect the confidentiality of some communications," but will invoke executive privilege against Congress only with "specific Presidential authorization," in the "most compelling circumstances," and "only after careful review demonstrates that assertion of the privilege is necessary."[9] The scope of the President's authority to withhold demanded information extends, under the executive view, to all information, the disclosure of which would impede the responsible discharge of executive branch functions. Such information may include state and military secrets, the contents of investigative files assembled for law enforcement purposes, information that would disclose the identity of a government informer, personal information about executive branch personnel, and other material generated in the process of policy deliberation, the disclosure of which would threaten intrabranch decisional processes.[10] In the executive view, privileged materials may emanate originally from staff levels considerably removed from the President, although a claim of privilege requires presidential familiarity with and review of the materials.[11]

Because the Executive branch regards the protection of confidential information as necessary to protect the integrity of executive power, it cannot discharge that responsibility by divulging information to Congress under a promise that Congress will act responsibly in deciding whether to disseminate the information further. Such a delegation of control over information would be, in the executive view, an unconstitutional abdication of power[12] analogous to an unconstitutional delegation by Congress of legislative authority via a standardless statute.[13] Further, as Attorneys General have recognized, this position obviates having the executive branch purport to decide which congressional committees are trustworthy, and which are not.[14] The executive branch asserts that it is obligated to divulge privileged information to Congress only when the institutional needs of Congress overbalance the interest of the executive branch in nondisclosure. According to the executive, moreover, it is entitled to follow its own best judgment as to where the balance of interests lies.

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 37, 39 (1982) ("[T]he President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.")

[13] *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[14] Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 37, 39 (1982). citing a 1941 letter from then-Attorney General Robert Jackson to Hon. Carl Vinson: "Unfortunately, . . . a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman."

As part of its balancing view, the executive branch concedes that the President may not invoke executive privilege to withhold information from Congress that is probative of executive wrongdoing.[15] Thus, prior to the Nixon impeachment investigation, Presidents had repeatedly stated the right of the House to demand executive branch evidence in connection with such inquiries; Nixon's refusal to honor Judiciary Committee subpoenas duces tecum was reported by that Committee as an article of impeachment.[16] A formal opinion by Attorney General William French Smith confirmed the Reagan Administration's agreement that information relevant to an investigation of executive corruption may not be shielded from oversight.[17]

The judicial view, as distilled from a very few opinions, respects elements of both the "congressional doctrine" and the "executive doctrine" of executive privilege. There is, however, no Supreme Court adjudication of any executive privilege dispute with Congress. There is thus no one opinion that purports to resolve definitively, from the judicial point of view, the principled contentions that such disputes involve. Several Supreme Court decisions nonetheless imply what the Court's view would be on a number of critical issues.

Of central importance is the 1974 opinion in United States v. Nixon,[18] which held that the President has a constitutionally based, but defeasible privilege to withhold information from a court based on a generalized claim of presidential confidentiality. The Court identified as the constitutional basis for the privilege "the supremacy of each branch within its own assigned area of constitutional duties,"[19] and "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties."[20] The Court was untroubled that the Constitution makes no express provision for executive privilege. Instead, citing the holding of McCulloch v. Maryland[21] with respect to the implied powers of Congress, the Court held that a presumptive executive branch privilege of nondisclosure could follow by analogous implication from those powers of the President that are express.[22]

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[15] *Id.* at 41.

[16] H.R. Rep. No. 1305, 93d Cong., 2d Sess. 4 (1974).

[17] 6 Op. Off. Legal Counsel 31, 36 (1982).

[18] 418 U.S. 683 (1974).

[19] *Id.* at 705.

[20] *Id.*

[21] 17 U.S. (4 Wheat.) 316 (1819).

[22] 418 U.S. at 705 & n.16.

Besides finding a constitutional basis for executive privilege against courts, the Nixon opinion is critical for two additional reasons. The first is its holding that the claim of privilege in that case was overcome by the institutional need of the trial court to have the information necessary to secure "the fair administration of criminal justice."[23] Putting aside whether the Court's balancing in Nixon was entirely persuasive,[24] it is a central element of the Supreme Court's doctrine that a claim of executive privilege may be weighed against the powers of the courts in performing their assigned constitutional tasks.

The other critical point is the Court's implication that different claims of privilege may be accorded different weights according to the bases of the claims. Thus, the Court distinguishes at length the generalized interest invoked in Nixon in the protection of confidential presidential communications from narrower claims of privilege based on military and state secrets, as to which "the courts have traditionally shown the utmost deference to Presidential responsibilities."[25]

The Court in Nixon expressly reserved any question concerning "the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."[26] One thus cannot be entirely certain whether the Court would recognize any constitutionally based privilege against Congress, or, if it did, whether its balancing approach would be the same. On the other hand, it is hard to imagine that the constitutionally based privilege recognized in Nixon would have no relevance whatever in a contest with Congress. The Court's modern approach to the separation of powers is generally a balancing approach, except in those cases in which the Court perceives it is interpreting a fairly specific structural or procedural constitutional command.[27] A separation of powers claim is recognized whenever the initiative of one branch substantially interferes with the power of another to accomplish its constitutional tasks; in such a case, the initiative must be justified by some overarching governmental interest.[28] Given this general approach, the Court would surely find those executive branch responsibilities supporting the existence of privilege in Nixon to be no less deserving of constitutional concern when the threat to the fulfillment of those executive duties emanates from an extrajudicial source. The two relevant Court of Appeals decisions on executive privilege against Congress are consistent with this analysis. Less than two months before United States v. Nixon, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld the D.C. District Court's refusal to enforce a Senate committee subpoena against Richard Nixon for the "original electronic tapes" of five conversations between Nixon and John Dean.[29] The court of appeals recognized a presumptive executive privilege to protect the confidentiality of presidential communications, and, in the peculiar context of this case, found that his privilege outweighed the need of the Senate Select Committee on Presidential Campaign Activities for the subpoenaed tapes. The dispositive facts were that copies of all the subpoenaed tapes had been delivered to the House Committee on the Judiciary in connection with the Nixon impeachment inquiry, four of the five original tapes had been delivered to the D.C. District Court in connection with the Watergate prosecutions, and the President had already released partial transcripts of the tapes at issue. Because of the House Judiciary Committee investigation, the Senate Committee's "oversight need for the subpoenaed tapes [was], from a congressional perspective, merely cumulative."[30] The Committee's need for the tapes in aid of its legislative function was likewise limited because the Committee pointed "to no specific legislative decisions that [could not] responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the [released] transcripts may contain."[31] This reasoning thus presages the Supreme Court's decision in both recognizing a presumptive, constitutionally based privilege in the President, and in holding that the privilege is defeasible.

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[23] *Id.* at 713.

[24] The Court's analysis is forcefully questioned in Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116 (1974). In applying the *Nixon* case, U.S. trial judges have balanced the relevant President's claim of confidentiality not against the institutional interests of the Court, but against the need of a criminal defendant for the information in order to support a particular defense. *See United States v. North*, 713 F.Supp. 1448, 1450 (D.D.C. 1989) (denying subpoena for testimony of President Reagan); *United States v. Poindexter*, 732 F.Supp. 142, 147-48 (D.D.C. 1990) (upholding subpoena for videotaped testimony of President Reagan, subject to special protections for President); *United States v. Poindexter*, Crim. No. 88008001 (HHG) (D.D.C. Mar. 21, 1990), available on LEXIS, Genfed Libary, Dist File) (upholding claim of executive privilege as to presidential diaries).

[25] 418 U.S. at 710.

[26] *Id.* at 712 n.19.

[27] Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

Three years later, the Court of Appeals followed a similar approach in monitoring an interbranch executive privilege dispute in United States v. American Telephone & Telegraph Co.[32] The adjudicated dispute arose when the Subcommittee on Oversight and Investigations of the House Interstate and

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[28] *Id.*

[29] Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974).

[30] *Id.* at 732.

[31] *Id.* at 733.

[32] United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977).

Foreign Commerce Committee subpoenaed documents from A.T. & T. pertaining to certain warrantless wiretapping that the United States, with the assistance of A.T. & T., assertedly conducted for national security reasons. The Department of Justice sued A.T. & T. to prevent compliance with the subpoena on the ground that public disclosure of the Attorney General's letters requesting foreign intelligence surveillance of particular targets would harm the national security. The chair of the House subcommittee intervened, on behalf of the House, as the real party defendant.

Rather than resolve the dispute on its merits, the Court of Appeals, when the case first reached it, remanded with a suggestion that the parties negotiate a settlement under guidelines proposed by the Court.[33] The Justice Department then proceeded--unsuccessfully--to attempt to negotiate a procedure under which, instead of receiving the demanded letters, the subcommittee would receive expurgated copies of the backup memoranda upon which the Attorney General based his decisions to authorize wiretaps.[34] Information identifying the wiretap targets would be replaced by generic descriptions written by the Department. Negotiations broke down over the procedure for assuring the subcommittee of the accuracy of these descriptions.

When the case returned to the Court of Appeals, the court ordered a procedure very close to the executive branch's final offer. It did so based essentially on three premises. First, the Court divined a constitutional requirement of interbranch compromise: "[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[35] Second, a court has power to balance the competing interests of President and Congress in a properly presented separation of powers case. Third, in proffering a settlement to Congress, the executive branch is entitled to respect for both its institutional interests and for its presumptive good faith, but Congress is likewise entitled to continuing judicial vigilance to assure that its oversight interests are fully protected.[36]

Supreme Court precedent relevant to interbranch privilege disputes includes cases upholding Congress' general investigative powers. Just as the Court in Nixon, without textual support, recognized a constitutionally implied executive power to resist disclosure of presidential communications, the Court, without textual support, has recognized a constitutionally implied power of congressional investigation. The leading case, McGrain v. Daugherty,[37] arose from a Senate investigation into alleged corruption in the Justice Department under former Attorney General, Harry M. Daugherty. The Court overturned a lower court order that had discharged Daugherty's brother from his obligation to testify before a Senate select committee investigating the alleged abuses.

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[33] United States v. American Telephone & Telegraph Co., 551 F.2d 384 (1976).

[34] 567 F.2d at 124-125.

[35] *Id.* at 127.

[36] *See id.* at 131 n.34.

In upholding the Committee's subpoena, the Court reached two critical holdings. The first was that "the power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function,"[38] and is, therefore, implicitly vested in Congress by the Constitution. The second is that, although this power exists only in aid of the legislative function, Congress need not have before it a specific legislative proposal in order for its authority to be triggered. Such was not the case in McGrain. It was sufficient that the Court could conclude on the face of the subpoena: "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."[39]

The crux of the judicial doctrine of interbranch executive privilege disputes thus appears to be as follows: Congress has a constitutionally based power to demand information pursuant to investigations in aid of its legislative and oversight functions. The President, on the other hand, has a constitutionally based privilege to withhold disclosure of information, the release of which would impede the performance of executive branch responsibilities. A presumptive claim of privilege may be asserted to protect even the President's generalized interest in confidential deliberations. Executive privilege, however, is defeasible, and a claim of privilege based on a generalized interest in confidentiality may well be less weighty than narrower claims based on military and state secrets.

It is readily perceptible that the body of precedent just recounted contains too few episodes analyzed in too little detail to serve as much of a constraint on the arguments that the political branches pose to one another. Nor is a great deal more judicial guidance likely to be forthcoming. Courts may pronounce on separation of powers issues only in properly presented article III cases. Many disputes between the political branches over principle never become "cases" because the branches reach informal settlements. Even fairly protracted disputes may not involve the interests of particular persons in a manner that confers individual standing to sue. Finally, even if executive privilege cases arise that do involve parties with standing, courts may invoke such "avoidance rules" as the ripeness doctrine to obviate any judicial conclusion on the merits.[40]

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[37] 273 U.S. 135 (1927).

[38] *Id.* at 174.

[39] *Id.* at 177.

Recourse to avoidance doctrines is likely because the ordinary judicial predisposition towards restrained decisionmaking has strong institutional reinforcement in a separation of powers case. The courts have nothing to gain institutionally from venturing putatively final resolutions to interbranch impasses that directly involve neither individual rights, nor the powers of the courts. Indeed, it is intriguing to review in this light the results of the three executive privilege cases described above. The Supreme Court unanimously demanded disclosure in one case, Nixon, in which the interest not only of the courts, but of Congress and of the public, seemed to be profoundly on the side of oversight. In Senate Select Committee, the D.C. Circuit upheld a privilege claim, but only in a case in which one committee of Congress already had the information that another committee sought. In the one truly close case of the three, United States v. A. T. & T., the Court resisted any decisive lawmaking--fashioning instead a mediator's role that balanced the two branches' compromise offers. This body of law strongly echoes the kind of diplomatic lawmaking of which Marbury v. Madison[41] is the classic example: the courts insist they have the power to declare what the law is, but nonetheless manage to legitimate the constitutional powers of both Congress and the President, calling upon both to reach reasoned compromises in any truly hard case.

II. Negotiating over Information

If law, in the sense of "rules," does not directly control the outcomes in interbranch disputes over information in any strong way, then, what does? Government officials interviewed for this study typically say, "Politics." This answer, seemingly synonymous with, "The stronger party prevails,"[42] conjures up an image of negotiating as arm-wrestling. Before exploring the details of specific negotiations, however, it is possible to identify at least three respects in which an arm-wrestling model of information disputes could well be misleading.

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[40] *See generally* Baker v. Carr, 369 U.S. 186, 217 (1962) (describing the circumstances in which the political question doctrine is properly invoked); Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting, disputing the existence of congressional standing to litigate disputes between Congress and the President), *vacated sub nom.* Burke v. Barnes, 107 S.Ct. 734 (1987).

[41] 5 U.S. (1 Cranch) 137 (1803).

[42] It has been argued that, even during the founding period, "[t]he relative political strengths of the branches (and the individuals involved) were more often than not the determinative factors in the resolution of [interbranch] access disputes." R. Ehlke, Congressional Access to Information from the Executive: A Legal Analysis, Cong. Research Serv. Rpt. No. 86-50A 2-3 (Mar. 10, 1986).

The first is that either branch may be strengthened politically by the weight of its legal arguments. Although the law does not directly control most information disputes, judicial precedent lends legitimacy to governmental concern for a variety of interests that one branch or another may invoke in a particular controversy. Arguing on the basis of such interests bolsters a political branch's public credibility. Thus, it is a mistake to conceptualize "politics" as if law were irrelevant to political strength.

Second, the branches have a strong and continuing interest in the success of their overall relationship. Despite an institutional competitiveness that is naturally augmented by differences between the political parties that control the two branches, there are also strong pressures for accommodation. These pressures plus the political salience of making principled arguments adds further complexity to any accurate model of interbranch negotiations.

Third, an accurate assessment of strength is necessarily multi-dimensional, and the relative strength of the two branches at any given moment may be difficult, even for the branches themselves, to calculate. It is not the case, despite Congress' appropriations and impeachment powers, and the political unpopularity of defending nondisclosure in all but extreme cases, that Congress always has the upper hand.

A. The Pattern--and Some Cases

In deciding whether the process of information exchange works well, two sets of questions are important, although each is hard to answer. The first pertains to the substantive quality of the information exchange: Does Congress get enough information, presented with sufficient helpfulness, to do its job well? To the extent there are interests in nondisclosure, either to the public generally or even to Congress, do the political branches assess and accommodate those interests appropriately? The second set of questions is procedural: Does it take too long for Congress to get the information it requires? Are negotiations more confrontational, and more costly in terms of the general interbranch political relationship, than they need be?

Some strong generalizations are possible as starting points in analyzing these issues. By all accounts, most congressional demands for information are handled without confrontation, and it is clear that most agencies respond to most requests by providing whatever information Congress is seeking. It follows that, in most cases, if Congress is not getting the information it needs, the problem is not agency unresponsiveness to Congressional demands, but something else. Indeed, in many contexts, Congress' main problem is as likely to be a surfeit of information, or at least of unfocused information, as it is to be an information deficit.[43]

One systematic attempt to measure agency nonresponsiveness to Congress was a 1974 study by the Senate Judiciary Committee to determine the number of executive refusals to provide information to committees or to subcommittees. The study turned up 284 refusals for a ten year period.[44] Although deplored in the report, these instances would amount to fewer than 30 per year out of what are likely to be hundreds of thousands of requests.

This pattern is confirmed by impressionistic evidence. For example, representatives of the Department of Defense general counsel's office estimated that, as of the summer of 1989, the Government Accounting Office--generally regarded as an arm of Congress--was conducting over 300 studies of their department. None, in their judgment, was proving confrontational, although much of the information being shared with the GAO is sensitive.

A spirit of cooperation will prevail equally when the executive responds affirmatively to Congressional requests for information and when an agency is persuasive that a requested disclosure would be inappropriate. A former assistant attorney general for legislative affairs reports that, during his period of service, offices of individual members sometimes called asking for the release of information concerning criminal investigations targeting their constituents or others. When he explained the Department's view as to the impropriety of sharing such information, the typical response was an expression of prior unawareness regarding the Department's position, and an acceptance of that position.[45]

The general pattern of responsiveness and nonconfrontation, however, does not belie the possible existence of real problems. Confrontational disputes, though rare, may be of special importance politically. They may concentrate in certain areas of public concern, so that public confidence in a well-informed Congress may justifiably be different for different certain subject matters.

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[43] In this respect, Congress' difficulties in managing information are likely to parallel those of administrative agencies. *See generally* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 216-30 (1978).

[44] SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS 1964-1973, at 13 (Comm. Print 1974).

[45] Interview with Robert A. McConnell, former assistant attorney general in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989) (notes on file with author).

Moreover, the lack of confrontation or tension in a particular case of disclosure or nondisclosure does not prove the appropriateness of the outcome in that case. A strong spirit of cooperation may signal a Congress too lenient in its oversight or an executive too lax in its management. A number of congressional employees with extensive oversight experience have expressed the view that many members are unaware of the full extent of their oversight prerogatives and, thus, they press less than they might for executive disclosure.[46]

To assess such potential problems against the backdrop of a generally successful pattern of information sharing, it is necessary to fix more concretely on specific disputes.

1. Secretary of Commerce Rogers C. B. Morton, 1975: Disclosure of Confidential Commercial Information

In 1975, the Subcommittee on Oversight and Investigations of the then-House Committee on Interstate and Foreign Commerce investigated the degree to which Arab countries had asked U.S. companies to refuse doing business with Israel.[47] On July 10, the subcommittee requested that the director of the Commerce Department's Office of Export Administration disclose to it copies of all boycott requests filed by U.S. companies under the Export Administration Act of 1969.[48] Secretary of Commerce Rogers C. B. Morton refused to produce the documents, citing section 7(c) of that Act:

No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.[49]

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[46] Interview with Morton Rosenberg, Congressional Research Service, in Washington, D.C. (Aug. 3, 1989) (notes on file with author); Interview with Charles Tiefer, Deputy General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Aug. 3, 1989) (notes on file with author).

[47] *See generally* Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975) (hereinafter, cited as *Morton Hearing*); Rosenthal and Gressman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74, 82-83 (1977).

[48] Morton Hearing, at 152.

[49] 50 U.S.C. §2406(c).

The subcommittee formally subpoenaed the documents on July 28, postponing the effective date of the subpoena until a hearing could be convened in September.[50]

On September 4, Attorney General Levi opined formally that §7(c) covered disclosures to Congress, and that Morton was empowered to withhold the documents, given the Secretary's conclusion that their release was contrary to the public interest.[51] Morton offered at a September 22 hearing to inform the committee of the number of reports filed, together with statistical information on the questions asked and the companies' responses, but, citing the Attorney General's opinion, Morton would not reveal the companies' names or details of particular transactions.[52]

On October 21 and 22, the subcommittee took testimony from a number of legal scholars concerning the Secretary's withholding of documents. When Secretary Morton persisted in his position, the subcommittee, on November 11, voted him in contempt.[53] On December 9, the full Interstate and Foreign Commerce Committee was scheduled to consider the contempt resolution. The day before, following an agreement with subcommittee chair Moss to receive the documents in executive session and not to make them public, Secretary Morton agreed to comply with the subpoena.[54] It thus took five months to secure compliance with the subcommittee's request, pursuant to an agreement to protect the confidentiality of the demanded documents.

2. Secretary of Energy Charles Duncan, 1980: Deliberative Documents on the Petroleum Import Fee

The final year of the Carter Administration witnessed a relatively brief, but highly confrontational dispute between a Democratic House subcommitee and a Democratic President concerning Congressional access to deliberative documents. On April 8, 1980, the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations requested that the Department of Energy disclose to it all documents relevant to President Carter's imposition, six days earlier,[55] of a fee on imported crude oil and gasoline.[56] The Subcommittee's express concerns were (1) the impact of the fee on supplies of gasoline and heating oil and (2) the capacity of the Department of Energy to monitor the fee program to assure its fairness.[57] It was indicative of the fee's unpopularity that Democratic House members were publicly organizing a resolution in opposition to the fee within two weeks of the President's order.

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[50] Morton Hearing, at 161.

[51] *Id.* at 173.

[52] *Id.* at 11.

[53] *Id.* at 133-34.

[54] Rosenthal and Gressman, *supra* note 47, at 83.

[55] Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980).

The Department's response was to refuse the transmittal of any documents pending their review by the White House. The Department pointedly sought to avoid the invocation of executive privilege, arguing only that the deliberative nature of the documents necessitated their review by the White House before an authoritative decision not to invoke privilege could be made.[58] Unpersuaded, the subcommittee, on April 22, voted to subpoena the documents.[59] The subcommittee then decided to give Secretary of Energy Duncan two days to respond to its request before formal service of the subpoena. On April 23, Secretary Duncan forwarded 28 documents, plus a letter explaining his decision not to provide "a substantial number" of other documents, including "memoranda setting out policy and legal advice to senior advisers of the Department and the Executive Office of the President, meeting notes, and drafts of documents."[60] Although not invoking privilege, Secretary Duncan wrote that full compliance with the subcommittee's subpoena "would affect adversely the free and frank exchange of opinions in future deliberations in the Department and the Executive Branch as a whole. . . ."[61]

Subcommittee chair Toby Moffett responded to the letter by engaging in personal negotiations with White House Counsel Lloyd Cutler and Secretary Duncan.[62] When those negotiations failed to produce an immediate resolution, the subcommittee reconvened a hearing at which it sought information from the Department of Energy's deputy general counsel, Thomas Newkirk, concerning the rationale for nondisclosure. Mr. Newkirk testified that there was no national security concern underlying the Department's reluctance to disclose, and defended the position that, if the President so determined, it could be appropriate to withhold under executive privilege even documents that had originally been prepared entirely for internal Department of Energy use.[63] At the conclusion of its April 24 session, the subcommittee moved to subpoena Secretary Duncan to appear personally with the demanded documents on April 29.[64]

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[56] *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 2 (1980) (hereinafter, cited as *Duncan Hearing*).

[57] *Id.* at 1-2.

[58] *Id.* at 3-8.

[59] *Id.* at 35.

[60] *Id.* at 96, 100-01.

[61] *Id.* at 101.

[62] *Id.* at 96.

On April 28, DOE's General Counsel Lynn Coleman offered to permit the subcommittee chair and its ranking member, Rep. McCloskey, to review the documents under a promise of confidentiality.[65] At the April 29 hearing, Duncan sought, again, to withhold the documents without invoking executive privilege, indicating, however, that privilege would be invoked if no accommodation could be found.[66] When he failed to accept an offer that the documents be presented to the subcommittee in executive session, not to be released further except by majority vote and after an opportunity for DOE to object, the subcommittee voted to hold Secretary Duncan in contempt.[67]

By May 14, 1989, the White House had decided to release all documents to the subcommittee under the terms of the subcommittee's final offer.[68] Although the subcommittee reconvened on May 14 to begin reviewing the merits of the fee program, the program was essentially foredoomed by a district court opinion one day earlier voiding the President's executive order as beyond his statutory authority with respect to import regulation.[69] The Senate Finance Committee immediately voted to approve legislation prohibiting any further fee.[70]

3. Secretary of the Interior James Watt, 1981-82: Executive Privilege and Foreign Trade Policy

The first highly publicized confrontation between Congress and the Reagan Administration over information involved former Secretary of the Interior James Watt. During the summer of 1981, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce requested from his department all documents--including documents at the staff level[71]--relevant to the status of Canada under the so-called reciprocity provisions of the Mineral Lands Leasing Act.[72] Watt testified on August 6, 1981 that the department was unlikely to divulge all of the relevant documents because some were confidential.[73] Just over seven months later, following full committee approval of a resolution to hold Watt in contempt of the House, the White House permitted subcommittee members to review the last of the documents that Interior had originally identified as responsive to the subcommittee demand.[74]

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[63] *Id.* at 102.

[64] *Id.* at 116-17.

[65] *Id.* at 119-20.

[66] *Id.* at 126.

[67] *Id.* at 134-39.

[68] *Id.* at 142.

[69] Independent Gasoline Marketers Council v. Duncan, 492 F.Supp. 614 (D.D.C. 1980).

[70] Duncan Hearing, at 141.

[71] *Watt Contempt Hearings*, *supra* note 5, at 3.

[72] 30 U.S.C. §181.

The general subject of the subcommittee's inquiry was the impact of Canadian energy and investment policies on United States energy resource companies holding assets in Canada. The hearings were prompted by allegations that the Canadian government was trying, through its policies, to devalue the assets of these companies unfairly and to provoke takeover attempts by Canadian interests.[75] Among the possible retaliatory steps available to the United States would have been invocation of the MLLA reciprocity provisions,[76] which permit foreign citizens to hold interests in mineral leases on United States public lands only if their countries provide equivalent opportunities for United States investors. Under the MLLA, Congress vested in the Secretary of the Interior the authority to determine whether foreign countries are providing reciprocal treatment for U.S. mineral investors. By the summer of 1981, Secretary Watt had not yet made a decision as to Canada. Because of the possibility that a decision adverse to Canada might help protect United States investment interests, the Committee's attention had turned to oversight of Watt's decisionmaking process. The subcommittee's informal demand[77] in early August 1981 elicited a turnover of 143 documents on September 24, 1981, accompanied by a letter from Watt's legislative counsel asserting that executive privilege might be invoked to protect various documents not disclosed. On September 28, the subcommittee voted to subpoena the remaining documents, and the subpoena was served, after further negotiation, on October 2. Watt responded by releasing an additional 32 documents following what he characterized as an "interagency review" of their contents. On October 13, 1981, President Reagan formally asserted executive privilege as to the final 31 documents.[78] Secretary Watt reported the President's decision in testimony to the subcommittee on October 14, 1981. At that time, Watt also asserted that the executive branch had tried unsuccessfully to proffer "other means to familiarize the subcommittee with the contents of these papers without the necessity of providing actual copies of the documents themselves."[79]

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[73] *Watt Contempt Hearings*, *supra* note 5, at 3.

[74] *Id.* at 385.

[75] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 3-4.

[76] 30 U.S.C. §181.

[77] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 4-8.

[78] *Watt Contempt Hearings*, *supra* note 5, at 68 (President Reagan's Memorandum for the Secretary of the Interior Re: Congressional Subpoena for Executive Branch Document).

In refusing Congress' request for all the documents, Secretary Watt relied on a formal opinion rendered to the President by the Attorney General upholding the President's claim of privilege.[80] The reasoning of the Attorney General's brief opinion was straightforward. It began from three premises. First, the executive branch is constitutionally entitled to protect "quintessentially deliberative, predecisional" documents.[81] Second, although Congress has legitimate interests in obtaining executive branch information, its interests in information "for oversight purposes [are] . . . considerably weaker than its interest when specific legislative proposals are in question."[82] Third, "[t]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances."[83] From these premises, it followed that the documents withheld could be withheld because they all were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations."[84] The Attorney General concluded, "The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by the production of these documents at this time."[85]

In the ensuing months, the subcommittee tried unsuccessfully to elicit the personal appearance of Attorney General William French Smith to defend his opinion. The printed hearings relating to the eventual resolution of contempt include a detailed rebuttal of the Smith opinion by then-General Counsel to the Clerk of the House, Stanley Brand,[86] and an exchange of testy letters between subcommittee chair John Dingell and the Department of Justice concerning the possibility of Smith's testifying.[87]

The Brand letter forcefully questions all of the Attorney General's assertions concerning the limited investigative powers of Congress. Brand argues that, to the extent executive privilege exists, those documents that were generated at the staff level in a cabinet department could never be protected by it.[88] According to Brand, Congress does not interfere with any executive power in demanding such documents, and its authority to seek such information in performing its oversight function is at least as great as Congress' investigative powers in connection with legislative deliberation.[89]

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[79] *Id.* at 67.

[80] 5 Op. Off. Legal Counsel 27 (1981), *reprinted at Watt Contempt Hearings*, *supra* note 5, at 104.

[81] *Id.* at 105.

[82] *Id.* at 106.

[83] *Id.* at 107.

[84] *Id.* at 105.

[85] *Id.* at 108.

[86] *Watt Contempt Hearings*, *supra* note 5, at 108.

[87] *Id.* at 260-266.

With negotiations over the documents proceeding, the subcommittee held hearings in November 1981 on the subject of executive privilege generally and on the Attorney General's opinion.[90] Neither the hearings, nor the continuing negotiations resolved the dispute. On February 2, 1982, without having met the subcommittee's disclosure demands, Secretary Watt announced that he had reached a decision on Canadian reciprocity favorable to Canada.[91] The next day, on February 3, Watt turned over 19 of the 31 contested documents on the ground that his reaching a final decision obviated further nondisclosure.[92] Six days later, the subcommittee's Democratic majority, joined by its ranking Republican member, voted to hold Watt in contempt and to report its resolution to the full Energy and Commerce Committee.[93]

With total compliance still not forthcoming, the full committee, on February 25, 1982, likewise voted to recommend that the House cite Watt for contempt.[94] This final committee action, and the virtual certainty of its approval by the full House, finally elicited settlement on the eve of the House vote. The White House agreed to permit subcommittee members four hours to review personally and to take notes on the remaining 12 documents. The documents would be reviewed on Capitol Hill, but remain within the custody of the executive branch. No staff personnel could review the documents, and no photocopying would be permitted.[95]

The immediate interests of both branches in the Watt imbroglio are superficially clear. The subcommittee wanted full access to information that might shed light on the usefulness of the MLLA reciprocity process to deal with the alleged problem of unfair Canadian policy, and to consider the need to amend the MLLA or to take retaliatory measures. The executive branch insisted that nondisclosure was essential to the integrity of its deliberative processes and foreign policymaking generally. Presumably, once Secretary Watt reached his final decision, the executive branch's interest in reaching that decision without distortions wrought by premature disclosure of internal deliberations was eliminated. The executive branch would retain, however, a generalized interest in protecting its deliberations and in maintaining confidences necessary to the successful conduct of foreign relations.[96]

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[88] *Id.* at 109.

[89] *Id.* at 111-115.

[90] *Id.* at 133-258.

[91] *Id.* at 318.

[92] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 7.

[93] *Watt Contempt Hearings*, *supra* note 5, at 295-296.

[94] *Id.* at 368-370.

[95] *Id.* at 385-386.

From a broader perspective, it is manifest that both branches perceived the Watt dispute in a wider legal and political context. Rep. Dingell, the subcommittee chair, was also chair of the full Committee on Energy and Commerce. From his vantage point, Watt's refusal to comply with the request for MLLA documents likely appeared part of a larger pattern of noncooperation between Watt and Congress over confidential information.[97] On the executive branch side, the Attorney General's vigorous defense of executive privilege occurred against the backdrop of a broader effort led by the Department of Justice to buttress executive branch control over the outflow of information generated within the executive branch.[98] Smith's opinion is notable, for example, for the breadth with which it attempts to establish a presumptive right of the executive branch to withhold deliberative documents from congressional committees.

Personality factors may also have aggravated the dispute, although it is hard to tell how much so. Secretary Watt was widely believed a zealot for Administration policy; Rep. Dingell is widely perceived to be among Congress' most powerful and aggressive members.[99] The public communications to Dingell and the subcommittee from various Department of Justice officials assumed no pretense of deference.[100] The final committee report hints of personality problems at the staff level, as well.[101] Nonetheless, in colloquies between Dingell and Watt, and between Dingell and Rep. Marc Marks, ranking Republican on the Dingell subcommittee, the parties were at pains to emphasize the nonpersonal nature of the dispute.[102]

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[96] 5 Op. Off. Legal Counsel 27, 29 (1981).

[97] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 66-67 (statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey).

[98] *See, e.g.*, the Attorney General's revocation of former Attorney General's Griffin Bell's restrictive policy concerning the circumstances under which the Justice Department would defend agencies' nondisclosure of records under the Freedom of Information Act, WASH. POST, May 5, 1981, at A11, col. 1; and the issuance of a national security directive strengthening the nondisclosure obligations of certain persons with access to classified information and subjecting such employees to possible polygraph examinations in connection with investigations of leaks, *National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 85-90 (1983).

[99] *Cf.*, Peterson, *Now It's Greetinggate: EPA Strikes Back with a "Dingellgram" of its Own*, WASH. POST NAT'L WEEKLY EDITION, Feb. 10, 1986, at 14; Nash, *The Power of the Subpoena*, N. Y. TIMES, Mar. 11, 1986, at 24, col. 4 (describing Dingell as "perhaps Capitol Hill's most zealous investigator and issuer of subpoenas").

[100] *E.g.*, Letter from Assistant Attorney General Robert A. McConnell to Hon. John D. Dingell (Dec. 8, 1981), *reprinted in Watt Contempt Hearings*, *supra* note 5, at 263-264.

[101] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 68-69 (statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey).

It may be that the Administration was destined, because of the size of the Democratic majority in the House, to lose this executive privilege battle, but it is also possible that the executive branch might have achieved its goal of delaying subpoena compliance without losing so much good will in the process. Notwithstanding the strong Democratic majority, Secretary Watt, an unpopular figure, did succeed in forestalling any release of the contested documents until he had made the decision that the subcommittee wanted to oversee. Furthermore, President Reagan's declared interest in nondisclosure was facially more compelling as a constitutional argument than the positions proffered, respectively, by the Ford and Carter Administrations in the Morton and Duncan disputes, discussed above.

A reasonable hypothesis might be that at least four factors over which the Administration had some control helped to galvanize the opposition to Watt. First, Watt had been injudicious in his attempts to control information in other disputes with the Energy and Commerce Committee, and had weakened his credibility generally. Second, the Attorney General's legal opinion was extremely broad in its justification of nondisclosure to Congress, and some arguments were sure to be seen as overreaching. Third, the Attorney General may have exacerbated his own credibility problem by refusing to defend the opinion personally. Fourth, lower level executive branch officials and legislative staff apparently did not enjoy uniformly good relations. It may have been, of course, that the executive branch viewed the subcommittee investigation--and the House, in general--with as much distrust as the subcommittee majority focused on Secretary Watt. The ultimate strength of the Democratic majority, however, provided a hedge that the Administration did not have against miscalculations made in the course of negotiations.

In sum, the Watt dispute does not appear to have been an efficient process for achieving an appropriate level of disclosure to Congress in a way that preserved the branches' ongoing relationship. The subcommittee ultimately prevailed in achieving access to all contested information and the Administration succeeded in resisting disclosure during the decisionmaking process regarding Canada, but the Administration suffered significant and unnecessary damage to its credibility.

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[102] *Watt Contempt Hearings*, *supra* note 5, at 89 (colloquy of Rep. Dingell and Secretary Watt), 286-287 (statements of Reps. Dingell and Marks); *but see* H.R. Rep. No. 898, 97th Cong., 2d Sess. at 68-69 (statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey) (attributing Secretary Watt's response to the Committee, in part, to "ego," "pique," and "personal arrogance.")

4. EPA Administrator Anne Gorsuch, 1982-83: Executive Privilege and Civil Law Enforcement

The second well-publicized executive privilege dispute between Congress and the Reagan adminstration involved Anne Gorsuch,[103] the former President's first Administrator of the Environmental Protection Agency, who became the first head of an executive branch agency to be held in contempt of Congress while in office.[104] The impetus for the contempt citation was Gorsuch's refusal to divulge certain documents to the Investigations and Oversight Subcommittee ("the Levitas subcommittee") of the House Committee on Public Works and Transportation, in connection with that subcommittee's investigation of EPA's administration of the so-called "Superfund" for the cleanup of hazardous waste dumping sites. The White House settled the dispute with the subcommittee on February 18, 1983,[105] slightly more than two weeks after a federal district court refused to review the legality of the House contempt citation prior to its enforcement.[106]

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as the Superfund Act,[107] created a $1.6 billion trust fund to be used for financing the cleanup of hazardous waste sites and spills of hazardous chemicals. Among other things, the Act authorizes the Government to act to control a hazardous waste situation when a responsible party either cannot be identified timely, or cannot act. Parties responsible for hazardous waste or chemical spill sites are required to reimburse the Government for cleanup costs and damages to natural resources; noncooperating parties may be fined treble damages. By executive order, President Reagan delegated his functions under the Act to the EPA

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[103] During the pendency of the dispute recounted here, Anne M. Gorsuch remarried and changed her name to Anne M. Burford. Because the earliest documents discussed herein refer to her only by the name "Gorsuch," that name is used exclusively throughout this article for consistency.

[104] H.R. Rept. No. 435, 99th Cong., 1st Sess. 3 (1985).

[105] WASH. POST, Feb. 19, 1983, at A1, col. 6. The terms of the final settlement were embodied in a March 9, 1983 memorandum signed by Reps. Dingell and Broyhill and Counsel to the President Fred Fielding. *EPA Document Agreement: Memorandum of Understanding*, 41 CONG. Q. 635 (1983). For another account of the Gorsuch confrontation, see Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L. J. 1333, 1334-1338 (1983).

[106] United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983).

[107] Pub. L. No. 96-510, 94 Stat. 2767 (1980).

Administrator, who was also designated the responsible official for enforcement of the Act.[108]

In 1982, several House subcommittees commenced investigations of various aspects of EPA's Superfund enforcement. The Levitas subcommittee, in March 1982, commenced a general investigation of hazardous and toxic waste control, focusing on the impact of such wastes and their control on American ground and surface water resources.[109] Of special concern were an EPA decision to suspend its prior restrictions on disposing containerized liquid wastes in landfills that might permit the migration of such wastes to ground and surface waters, and allegations that the EPA was not adequately enforcing the Superfund provisions against parties responsible for hazardous waste sites.[110] On September 13 and 14, 1982, subcommittee staff requested access to EPA's files on enforcement of the Superfund Act and related statutes in so-called Region II.[111] Despite an early assurance of access,[112] EPA subsequently informed the subcommittee that it would not make available certain materials in enforcement files connected with active cases.[113] This dispute eventuated in the contempt citation against Administrator Gorsuch.

At almost the same time as the Levitas subcommittee staff requested access to EPA files on Region II, the Oversight and Investigations Subcommittee ("the Dingell subcommittee") of the House Committee on Energy and Commerce requested documents relating to several hazardous waste sites outside Region II, on which that subcommittee's investigation of enforcement effectiveness was focusing.[114] Although the Dingell subcommittee's investigation did not spawn any contempt citations of its own, the coexistence of different EPA oversight hearings and demands for access to enforcement files seems to have been critically important to the dynamics of the interbranch negotiation over the Levitas subpoena. The broader range of interested parties made negotiation more difficult because of the greater number of persons to satisfy, the greater likelihood that congressional access to EPA files would undermine executive control generally over the outflow of information on

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[108] Exec. Order No. 12,316, 3 CFR 168 (1982), *reprinted in* 42 U.S.C. 9615 at 1444-45.

[109] H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982).

[110] *Id.*

[111] *Id.* at 11.

[112] *Id.* at 13-14.

[113] *Id.* at 15.

[114] *Id.*

Superfund investigations, and the involvement of more strong personalities, including Rep. Dingell, Secretary Watt's successful opponent.[115]

After the Levitas subcommittee staff, in September 1982, demanded access to EPA enforcement files, two weeks of unsuccessful negotiations ensued at the staff level.[116] EPA offered to permit staff access to its files, subject to prescreening by an EPA official to maintain the confidentiality of sensitive documents. The offer was declined. On September 30, 1982, the subcommittee authorized subpoenas to issue for the requested documents.[117]

Throughout most of October 1982, service of the subpoenas was postponed under EPA assurances of cooperation.[118] EPA continued to assert confidentiality for a limited class of litigation-related documents, but then reverted to its position of protecting all "enforcement sensitive" documents--apparently as a reaction to the issuance of a subpoena by the Dingell subcommittee for similar information. On November 22, 1982, the Levitas subcommittee served a broad subpoena on Gorsuch, demanding the documents and her testimony on December 2, 1982.[119]

On November 30, 1982, Attorney General Smith released a letter to Rep. Dingell, justifying the Administration's refusal to comply with a subpoena for "sensitive open law enforcement investigative files."[120] Smith forwarded the letter also to Rep. Levitas, to explain EPA's refusal to comply fully with the latter's subpoena, as well.[121] On the same day, President Reagan issued a memorandum to Gorsuch directing that she not divulge documents from "open investigative files, [which] are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions . . . ."[122]

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[115] Whether the separate Dingell investigation would have made settlement more difficult apart from the alleged intransigence of Justice Department attorneys is a point Congress disputes. According to the 1985 House Judiciary Committee report on the EPA dispute, the Dingell subcommittee's minority counsel proposed a settlement that was deemed acceptable by a deputy assistant attorney general in charge of the Lands and Natural Resources Division in mid-October. H.R. Rept. No. 435, 99th Cong., 1st Sess. 96-103 (1985). As the Judiciary Committee dissenters note, however, it is unclear whether this official ever told any other member of the Justice Department of the minority counsel's proposal or of his own reaction to it. *Id.* at 737-38, 777-78.

[116] H.R. Rep. No. 968, 97th Cong., 2d Sess. 11-13 (1982).

[117] *Id.* at 13.

[118] *Id.* at 13-15; *Hazardous Waste Contamination of Water Resources--Access to EPA Superfund Records: Hearing Before the Investigations and Oversight Subcomm. of the House Comm. on Public Works and Transport.*, 97th Cong., 2d Sess. 88 (1982) (hereinafter cited as *EPA Records Hearing*).

[119] H.R. Rep. No. 968, 97th Cong., 2d Sess. 15 (1982).

[120] Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted id.* at 37-41 [hereinafter cited as *Att'y Gen.'s Gorsuch Letter*].

[121] H.R. Rep. No. 968, 97th Cong., 2d Sess. 36 (1982).

The Attorney General articulated a series of justifications for the nondisclosure of open investigative files: forestalling political influence over the conduct of an investigation, preventing the disclosure of investigative sources and methods, protecting the privacy of innocent parties named in investigative files, protecting the safety of confidential informants, and maintaining the appearance of "integrity, impartiality and fairness of the law enforcement system as a whole."[123] He indicated that no assurance of confidentiality from Congress would permit the President to share his responsibility to protect the information in question,[124] but nonetheless articulated one exception to the rule of nondisclosure: "These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review."[125]

Following the subcommittee's December 2 hearing, General Counsel Brand, on December 8, issued a legal response to the Attorney General's letter, again challenging each of his assertions as to the limitations on Congress' oversight authority.[126] On the same day, Levitas met with Administration officials to attempt a settlement. Levitas made the following offer: Subcommittee staff could review and designate for copying and delivery to the subcommittee all EPA documents relative to the waste sites at issue. If EPA or the Justice Department designated any document selected for delivery as sensitive, it would remain at EPA for inspection there. If actual delivery to the subcommittee of any of these documents proved necessary, further subpoenas might issue. All information disclosed would be treated as confidential.[127]

The Attorney General, the next day, declined the settlement offer, reiterating instead EPA's original offer of access subject to EPA prescreening. The only concession was that prescreened documents would be withheld ultimately from the subcommittee only after broad-based and high-level review in the Executive branch.[128] On December 10, the full Public Works and Transportation Committee responded by recommending, in a party-line vote, that the House hold Gorsuch in contempt.[129]

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[122] *Id.* at 42-43.

[123] *Att'y Gen.'s Gorsuch Letter*, *supra* note 123, at 38.

[124] *Id.* at 39.

[125] *Id.* at 41.

[126] *House General Counsel's Memorandum*, *supra* note 6, at 58-64.

[127] H.R. Rep. No. 968, 97th Cong., 2d Sess. 20-21 (1982).

[128] *Id.* at 21-22.

[129] *Id.* at 23. *See also id.* at 72-76 (dissenting statement of Republican committee members).

Six days later, the House overwhelmingly approved a resolution to certify Gorsuch's "contumacious conduct" to the U.S. Attorney for the District of Columbia.[130] Prior to the actual certification, the Justice Department filed an extraordinary suit in federal district court to enjoin further action to enforce the subpoena on the ground of its unconstitutionality.[131]

The District Court on February 3, 1983 dismissed the Justice Department's suit on the ground that any constitutional issue raised by the subpoena could be resolved in a judicial proceeding brought to enforce the subpoena.[132] With the U.S. attorney's office still insisting that it was not bound to enforce the subpoena,[133] Levitas and Reagan reached agreement on February 18, 1983 that the subcommittee would receive edited copies of all relevant documents and a briefing on their contents, and then would be permitted to review any requested unedited documents in closed session.[134]

Although the February 18 settlement resolved the Levitas dispute, it did not end the overall imbroglio. Still pending were subpoenas from the Dingell subcommittee, which now asserted that its investigation was focusing on specific allegations of misconduct by EPA officials.[135] Rita Lavelle, the Superfund administrator and the most prominent of these officials, was dismissed on February 7, 1983 by the President amid allegations of her perjury to Congress and improper administration of the trust fund.[136]

Following the agreement with Levitas on February 18, further disclosures of possibly criminal conduct at EPA made prolonged resistance to the Dingell subpoenas politically impossible.[137] On March 9, 1983, Anne Gorsuch resigned as EPA administrator,[138] and the White House agreed to deliver all subpoenaed documents to the Dingell subcommittee, subject to certain limited protections for the confidentiality of enforcement-sensitive materials.[139]

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[130] Davis, *Gorsuch Contempt Charge Puts Focus on Enforcement of Hazardous Waste Laws*, 40 CONG. Q. 3162 (1982).

[131] Davis, *Legal Showdown Escalating in Gorsuch Contempt Case*, 41 CONG. Q. 11 (1983).

[132] United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983).

[133] It appears that the decision not to proceed with the contempt citation was made independently by the U.S. attorney for the District of Columbia. H.R. Rept. No. 435, 99th Cong., 1st Sess. 19 (1985). That decision, however, reflected long-standing Justice Department policy. Memorandum from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, for the Attorney General, Re: Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning an Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States 29-31 (May 30, 1984), *reprinted id*. at 2544, 2584-86.

[134] See *supra* note 105.

[135] *EPA: Investigation of Superfund and Agency Abuses (Part One): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1-7 (1983) [hereinafter cited as *Dingell EPA Hearings*].

[136] *Reagan Orders Investigation of EPA Charges*, Wash. Post, Feb. 17, 1983, at A1, col. 1.

The Gorsuch episode is striking because, in defending nondisclosure, the executive branch was protecting more specific and more obviously legitimate concerns than had been articulated in connection with the Watt matter. These were further identified in a December 14, 1982 memorandum to the Attorney General from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, who hinted at concern that members of Congress obtaining access to law enforcement files "might have relationships with potential defendants" in EPA enforcement actions.[140] What weakened the case for nondisclosure was not the implausibility of the executive's articulated position, but the strains on the executive branch's credibility wrought by the Watt affair[141] plus the credibility of the growing allegations that EPA officials were guilty at least of mismanaging the Superfund program.

In retrospect, a strong possibility appears that the protracted, even bitter quality of this dispute over information was fueled by a failure of communication between the Dingell Subcommittee and the Justice Department Office of Legal Counsel--a failure of communication exacerbated, in turn, by a failure of communication within the executive branch.

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[137] The House Judiciary Committee concluded from its investigation that the disputed documents contained sufficient "signposts" of wrongdoing that the executive branch *should* have recognized earlier than February, 1983 the untenability of the privilege claim, even under the executive branch's view of privilege. H.R. Rept. No. 435, 99th Cong., 1st Sess. 9-10 (1985). The report does not allege, however, that the executive branch withheld the documents after the relevant officials had actual knowledge of likely EPA wrongdoing, only that the officials should have investigated the alleged "signposts" more thoroughly. *Id.* at 140.

[138] *Burford Quits As EPA Administrator*, Wash. Post, Mar. 10, 1983, at A1.

[139] *Dingell EPA Hearings, supra* note 136, at 371.

[140] H.R. Rep. No. 968, 97th Cong., 2d Sess. 82, 89 (1982). In fact, OLC investigated whether any of EPA's investigative targets in two areas being scrutinized by the Dingell subcommittee were political contributors to Reps. Dingell or Mike Synar of Oklahoma. H.R. Rep. No. 435, 99th Cong., 1st Sess. 124-132 (1985). A deputy assistant attorney general in charge of OLC "concluded there were some potential connections," but "all possible matchups were not pursued," and no use was made of the information. *Id.* at 131.

[141] "[T]wo matters--an executive privilege controversy between Secretary of the Interior Watt and prior informational policies with respect to Congress--. . . appear to be highly relevant to the [Judiciary] Committee inquiry [into the EPA dispute] because they shaped expectations--and perhaps motivations--in the EPA controversy itself." H.R. Rept. No. 435, 99th Cong., 1st Sess. 26 (1985).

When the Dingell subcommittee requested information from EPA in September, 1982 concerning enforcement actions at particular sites, the subcommittee had already focused internally on the possibility that political considerations were affecting enforcement decisions.[142] Its suspicions were bolstered in October when Lands Division deputy assistant attorney general Alfred Regnery, in hopes of settling the dispute, permitted the subcommittee's counsel, Richard Frandsen, to review the documents being withheld from disclosure to the subcommittee. Frandsen not only spotted a key inculpatory document, but recognized its significance.[143] Furthermore, it appears that EPA staff shared the subcommittee's concerns. In dealing with EPA employees, the subcommittee staff was dealing with people who apparently understood quite clearly what the subcommittee was after.[144] Thus, it is likely that subcommittee members and staff had tentatively concluded by early fall that EPA wrongdoing was at issue *and* that, at the time the Justice Department was advising the President to invoke executive privilege, the negotiators for the executive branch knew of the subcommittee's concerns and of their seriousness. With these assumptions, it would be unsurprising for congressional negotiators to interpret the nondisclosure of EPA documents as a strong indicator of Justice Department concealment and bad faith.

The subcommittee, however, did not publicly signal allegedly improper political influence as the focus for its investigation until December 1982,[145] and OLC was not privy to the suspicions of EPA staff. The subcommittee's unwillingness to share its suspicions with OLC thus left the assistant attorney general in charge of that office unaware throughout the fall of 1982 either that improper political influence might have occurred at EPA or that dcuments sought by the subcommittee might help prove it. The House Judiciary Committee, later investigating the episode, "found no evidence" that, prior to February 1983, Assistant Attorney General Olson "understood the [incriminating] significance of the notes" that the Dingell subcommittee had acquired.[146] On the contrary, "[t]he information that the Judiciary Committee received strongly indicated that" at the time OLC recommended that President Reagan invoke executive privilege "Olson and OLC had no idea that the . . . documents reflected misconduct."[147] From Mr. Olson's point of view, then, the aggressiveness of the subcommittee in pursuing 35 documents withheld after the release of 40,000 others was bound to appear grossly unreasonable.

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[142] H.R. Rep. No.435, 99th Cong., 1st Sess. 31 (1985) ("Although . . . the Dingell . . . Subcommittee[] had been involved in the oversight of EPA activities well before September 1982, [it] had made no public findings or allegations of impropriety concerning the general administration of the Superfund program. During the course of the controversy, however, there were a number of disclosures that raised questions about possible wrongdoing by EPA officials, including suggestions that decisions on certain Superfund sites had been made for political reasons."

[143] *Id.* at 97-99.

[144] *Id.* at 32-35, 59.

[145] *Id.* at 233.

[146] *Id.* at 12.

5. FTC Commissioner Terry Calvani, 1988: Disclosing Deliberations with Personal Advisers

During early October 1987, the House of Representatives was set to vote on a proposed amendment to a new Federal Trade Commission authorization bill that would have authorized FTC investigations of possible unfair and deceptive acts and practices in the U.S. airline industry.[148] The *Washington Post*, on October 3, 1987, quoted an FTC press release reporting on a supposed letter from the FTC to the National Association of Attorneys General, concerning the NAAG's promulgation of proposed State guidelines for regulating the airlines. The release represented the FTC as having said: "We are unaware of any evidence indicating that airline fare advertising, frequent flyer programs, or overbooking compensation policies are generally unfair or deceptive."[149] Some House members relied on this statement in debate, successfully opposing an authorization provision that would have strengthened FTC oversight of the airlines.[150]

In fact, the FTC had not made the statement. Its letter to the NAAG said: "Unless the task force has evidence indicating that airline fare advertising, frequent flyer programs, or overbooking compensation policies are generally unfair or deceptive, the legal and factual basis for the draft guidelines are not clear."[151] Concerned about the discrepancy between the FTC's actual and reported statements, the Dingell subcommittee formally requested that the Federal Trade Commission supply to it all documents relating to the FTC's letter to the NAAG and to the press release issued concerning that letter.

The FTC supplied all the demanded documents, except for the documents of three commissioners that reflected communications between those commissioners and their personal advisers. Two of the three commissioners permitted committee staff to inspect those documents in the commissioners' offices, although they indicated that the papers in question did not have any information connecting the FTC comments for the NAAG with Congress' pending consideration of legislation about airline regulatory authority.[152] The third, Commissioner Calvani, initially refused to comply on grounds of privilege, asserting also that the relevant documents in his possession indicated nothing pertinent to the committee's concerns.[153] Following four months of correspondence and meetings between the commissioner and committee staff, the subcommittee formally served a subpoena for his documents.[154] Under protest, he complied at a subcommittee hearing three weeks later.[155] To the Commissioner's personal knowledge, none of the documents he produced prompted any follow-up by the subcommittee.[156]

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[147] *Id*. at 140.

[148] *Subpoenaed Documents from Federal Trade Commissioner Terry Calvani: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 5 (1988).

[149] *Id*. at 1-2.

[150] *Id*. at 2, 10.

[151] *Id*. at 2.

6. 1989 Oversight of the Internal Revenue Service

During July 1989, the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations held hearings regarding alleged corruption in the Internal Revenue Service.[157] Among other things, the hearings targeted an alleged incident in which an IRS official agreed to audit the economic competitor of an individual who had bribed the official.[158] In preparation for the hearing, the subcommittee asked the IRS for all tax information it had relating to the putative victim of the scheme.

This episode is noteworthy because the branches reached a fairly expeditious and nonconfrontational settlement despite two ordinarily strong obstacles to disclosure. The first is the general statutory bar to the disclosure of tax returns and tax return information. The statute at issue authorizes disclosure to most congressional committees pursuant only to a resolution of the house of Congress of which the committee is a part.[159] The subcommittee eliminated this barrier, however, by obtaining the taxpayer's waiver of the nondisclosure provisions with respect to the subcommittee. The IRS Commissioner did not find that the resulting disclosure would "seriously impair Federal tax administration,"[160] thus clearing the way for subcommittee access under the statute.

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[152] *Id.* at 3.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 46.

[156] Telephone interview with Federal Trade Commissioner Terry Calvani, in Washington, D.C. (Jan. 8, 1990).

[157] *IRS Senior Employee Misconduct Problems: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong., 1st Sess. (1989).

[158] The facts reported in this subsection are all derived from an interview with Peter S. Barash, staff director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington D.C. on Aug. 3, 1990.

[159] 28 U.S.C. §6103 (f).

The second obstacle was Rule 6(e) of the Federal Rules of Criminal Procedure, prohibiting the disclosure of information that is part of a grand jury investigation. Although, in the course of negotiations, the Justice Department cited 6(e) as a ground for nondisclosure, the Department did not formally invoke the rule when the subcommitee made clear its intention to subpoena the information, if necessary.

Despite these obstacles and the sensitivity of the subject matter, the subcommittee agreed with the Internal Revenue Service that (1) staff would have access at IRS to all the information requested, (2) staff could takes notes on the documents, (3) the documents would remain within IRS custody, and (4) the subcommittee would not publicly rely on any data garnered from the documents unless it was confirmed from another source.

7. Intelligence Committees: A Modus Operandi

The three subcommittees involved in the four previous episodes are devoted exclusively to oversight. They are thus relatively distinctive in the depth of their experience with the nuances of information exchange, and in the degree to which their watchdog role is undiluted by their political identification with particular programs they helped to design and enact. Even subcommittees devoted exclusively to oversight, however, generally proceed with their investigations without the benefit of detailed rules governing the exchange of information with the executive branch.

The two oversight committees that are exceptional in this last respect are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. The requirement that these committees be "fully and currently informed" of all intelligence activities appears in statute,[161] as does a requirement that:

> the House of Representatives and the Senate, in connection with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods

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[160] 26 U.S.C. §6103(e)(7).

[161] 50 U.S.C. §413(a)(1).

> furnished to the intelligence committees or to Members of the Congress under [the statute].[162]

Pursuant to this provision, the Houses of Congress have adopted similar rules that amount to a unique *modus operandi* for the sharing of information between the branches. In their key provisions, the rules of each House provide that:

> 1. Committee employees must agree in writing to abide by committee rules and must receive an appropriate security clearance before receiving access to classified information;[163]
>
> 2. Members of the committees are forbidden to disclose information individually if the rules provide that such information may be released only pursuant to committee vote;[164]
>
> 3. The President may object to a committee vote to disclose properly classified information submitted to it by the executive branch, in which case the information may be disclosed only pursuant to a vote of the entire House;[165] and
>
> 4. The committees may regulate and must record the sharing of information made available to them with other committees or with any Member of Congress not on the committees.[166]

In an interview, Britt Snider, general counsel to the Senate Select Committee on Intelligence, expressed the view that his committee has enjoyed a generally smooth relationship under these rules with those departments and agencies involved in intelligence. Mr. Snider attributes the success of the relationship to at least seven factors:

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[162] 50 U.S.C. §413(d).

[163] Standing Order of the Senate on the Select Committee on Intelligence [hereinafter, *Senate Intelligence Committee Order*], §6, *reprinted in* S. COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. No. 1, 100th Cong., 1st Sess. 141 (1988) [hereinafter, *Senate Manual*]; House of Representatives Rule XLVIII [hereinafter, *House Intelligence Committee Rule*], §5, *reprinted in* W. H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. 248, 100th Cong., 2d Sess. 756 (1988) [hereinafter, *Jefferson's Manual*].

[164] Senate Intelligence Committee Order, §8(a), *reprinted in* Senate Manual, at 142; House Intelligence Committee Rule, §7(a), *reprinted in* Jefferson's Manual, at 757.

[165] Senate Intelligence Committee Order, §8(b), *reprinted in* Senate Manual, at 142-43; House Intelligence Committee Rule, §7(b), *reprinted in* Jefferson's Manual, at 757-59.

[166] Senate Intelligence Committee Order, §8(c), *reprinted in* Senate Manual, at 144; House Intelligence Committee Rule, §7(c), *reprinted in* Jefferson's Manual, at 760.

> 1. The existence of an orderly process through which the executive can object to the release of information;
>
> 2. A tacit understanding that the committees will not ordinarily seek to discover the identifies of particular agents;
>
> 3. Agency understanding of the role that the committee plays in bolstering the intelligence community's credibility in Congress and its ability to win support;
>
> 4. A generally bipartisan sense of shared objectives;
>
> 5. The relative stability of the membership on the congressional staffs;
>
> 6. Systematic contact between the committees and the leadership of each House, which is represented on each committee *ex officio*; and
>
> 7. The regularity with which it is possible to seek higher level review within the bureaucracy for staff refusals to disclose information to the committee.[167]

Several members of the executive branch who have been involved in national security matters independently express agreement with Mr. Snider's view.

Taking the collective experience of the intelligence committees as a single case study, however, illustrates the knottiest conundrum in analyzing the success of the branches' information sharing processes from a wholly procedural perspective. Mr. Snider's observations support the view that, when the intelligence committees demand information, there is reason to believe that the transaction costs for obtaining the information will not be unduly high. This is not to say, however, that the committees will get all the information that sound policy making requires. The committees may not be able to identify the information they should have, and the executive may seek to circumvent its statutory obligations to take the initiative in informing Congress of intelligence-related matters.

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[167] Interview with Britt Snyder, staff director and general counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990).

These dangers were dramatically illustrated, of course, by the so-called Iran-Contra affair, in which the executive branch structured its covert programs for selling arms to Iran and diverting profits for the aid of the Nicaraguan resistance in order to prevent congressional oversight.[168] The congressional committees investigating the affair found: "The statutory option for prior notice to eight key congressional leaders was disregarded throughout [the Iran-Contra episode], along with the legal requirement to notify the Intelligence Committees in a 'timely fashion.'"[169] The committees were unanimous "that officials of the National Security Council misled the Congress and other members of the Administration about their activities in support of the Nicaraguan Resistance."[170]

Moreover, some observers believe that, putting aside executive malfeasance, the *modus operandi* of the intelligence committees helps to insure an underinformed Congress. The stability of relationships between these committees and the agencies that they oversee may foster leniency in oversight. Intelligence agencies may use the information access they provide to the intelligence committees to resist access to other committees that properly have intelligence-related matters under their jurisdictions.[171] Such resistance occurs despite the existence of congressional rules stating that intelligence committee access is not to be used to deny access to other committees in appropriate cases. These circumstances promote suspicion that the intelligence committees identify more strongly with the "cause" of the agencies than with the goal of democratic oversight of national security policy.

The degree to which committee co-optation and the insulation of intelligence agencies from other committees' review have occurred is difficult to assess. Whether such phenomena have resulted in a Congress less informed than it would be without the intelligence committee system is probably unknowable. Mr. Snider's view is that the difference in the quality of oversight before and after the creation of the current intelligence committees "is like night and day. . . .[N]ot another agency in the federal government . . . receives the degree of congressional oversight given the CIA." Although he acknowledges the possibility that the intelligence agencies may be less than fully forthcoming, he sees essential safeguards in (a) the political cost to the agencies of being discovered withholding information, and (b) the experience and knowledge of the committees and their staffs, which support independent judgments about the positions taken by the intelligence agencies. The incentives are sufficient, according to Mr. Snider, to promote routine agency initiatives to brief the committees on new developments.[172]

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[168] *See generally* Note, *Undermining Congressional Oversight of Covert Intelligence Operations: The Reagan Administration Secretly Arms Iran*, 16 N.Y.U. REV. L. & SOC. CHANGE 229 (1987-88).

[169] H.R. Rep. No. 433 and S. Rep. No. 216, 100th Cong., 1st Sess. 379 (1987).

[170] *Id.* at 447 (minority report of Rep. Cheney, *et al.*).

[171] Interview with Charles Tiefer, deputy general counsel to the clerk of the House of Representatives, in Washington, D.C. (Aug. 3, 1990).

B. Factors Shaping Negotiation

Reflection on these case studies helps to suggest a fairly detailed understanding of the dynamics of information sharing between Congress and the executive. The outcome of a particular demand, as well as the process by which the resolution is achieved, may be affected by a variety of factors that can be grouped under three broad headings: the *stakes* for either branch in receiving or withholding particular information, the existence of *avenues for compromising* competing interests, and the *political atmosphere* in which the negotiation will occur.

1. The Competing Stakes and the Avenues for Compromise

The stakes in a dispute over information may be assessed along several dimensions. Most generally, what is at stake for Congress is the performance of one of its primary functions: routine oversight; the contemplation of possible legislation; the review of a nomination requiring Senate advice and consent; or the investigation of possible official wrongdoing. The range of potential subjects within Congress' purview is as broad as the range of subjects within its article I and article IV regulatory powers. That is, the range is limitless.

The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These are:

1. Protecting national defense and foreign policy secrets;

2. Protecting trade secrets of confidential commercial or financial information;

3. Protecting the candor of intrabranch policy deliberations;

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[172] Letter from L. Britt Snider, General Counsel, Senate Select Committee on Intelligence, to Professor Peter M. Shane, University of Iowa (July 10, 1990).

> 4. Preventing unwarranted invasions of personal privacy, whether of government officers, employees, or private persons; and
>
> 5. Protecting the integrity of law enforcement investigations and proceedings.[173]

If all of what the branches perceive to be critically at stake in a particular dispute boils down to a contest between Congress' ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns just catalogued, the prospects for a nonconfrontational resolution are good.[174] That is because, between complete acquiescence in Congress' demand and complete acquiescence in executive nondisclosure, there are four intermediate options, each of which permits a balancing of the branches' competing concerns:

> 1. The executive may provide the information requested, but in timed stages. A delay in providing information might permit the executive to conclude a law enforcement investigation or a policymaking process that it does not wish to subject to premature scrutiny.[175]
>
> 2. The executive may release the information requested, but under protective conditions ranging from Congress' promise to maintain confidentiality for the information it obtains to congressional inspection of the material while it remains in executive custody. Such protective conditions are most helpful when the executive concern is less with the initial revelation to Congress and more with the possibility of subsequent redissemination of the material to other audiences.
>
> 3. The executive may release expurgated or redacted versions of the information demanded. Redaction is obviously helpful in preserving the confidentiality of

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[173] This catalogue of interests mirrors the various grounds specified in the Freedom of Information Act, 5 U.S.C. §552(b), for exemptions from the ordinary rule of mandatory disclosure of executive branch records.

[174] The following analysis is based, in part, on Shane, *supra* note *, at 520-29.

[175] Such was the de facto consequence of the Watt executive privilege dispute, in which full disclosure did not occur until Secretary Watt had concluded the deliberative process with respect to Canada's status under the Mineral Lands Leasing Act.

> informants, shielding personal privacy, and protecting the details of investigative methods.
>
> 4. The executive may release prepared summaries of the information demanded. Where the expurgation of existing documents would be insufficient to protect interests in confidentiality, the executive may be able to satisfy Congress' information needs by summarizing the information of direct relevance to Congress. As the *A. T. & T.* litigation suggests, it is possible to give Congress added assurance of the accuracy of the summaries by permitting selective sampling to compare original documents to the summary presentations.

Of course, at the same time that the branches are promoting their routine institutional concerns, other political factors may come into play. Congressional vigor in investigating an unpopular or ill-managed program may boost the political strength of Congress or, in what amounts to the same thing, may weaken the political stature of the executive. Similarly, executive nondisclosure may defer or limit the exposure of material that would associate the executive with a politically unpopular position. It may distract public attention from an underlying policy dispute, and raise the transaction costs generally for members of Congress intent on vigorous oversight.

Such political considerations may come into play no matter which party controls either end of Pennsylvania Avenue; the Democratic Congress' dispute with President Carter's Energy Secretary illustrates the point. It is reasonable to hypothesize, however, that the long-term difference in the partisan control of the two branches has significantly increased the branches' willingness to conduct their institutional competition openly. Demographics and the pattern of recent electoral results suggest that Republican control of the executive and Democratic control of Congress are likely to continue.

Even partisan political considerations, however, need not undermine the possibilities for compromise. Despite the potential political gains for Congress in the IRS investigation discussed earlier, no confrontation occurred. In part, this may be because the Bush Administration did not regard the potential results of the investigation as likely to be damaging to the incumbent President. The same factor might help explain Secretary Jack Kemp's cooperation in a congressional investigation of alleged abuses during the Reagan years in the administration of the Department of Housing and Urban Development.

These examples of cooperation, however, also reflect explicit executive endorsement of the principle that Congress--as in the IRS matter--is entitled to broad accommodation in its investigations of alleged official wrongdoing. Putting aside the potential embarrassment, this general stance recognizes that a President's willingness to be forthcoming in a corruption investigation may prove a political plus for any Administration that does stand to be tarnished by a particular investigation. White House cooperation in the Iran-Contra investigation is also illustrative on this score.[176] Thus, it may be most accurate to say that, in the IRS investigation, Congress and the executive reached a relatively quick agreement because (1) the immediate institutional needs of the branches could be accommodated through a compromise on the form of disclosure, and (2) the potential political gains to Congress either did not threaten to undermine the President's position, or the executive lacked any option more politically advantageous than cooperation. This may well be a common pattern.

In analyzing the stakes in a particular information dispute, the greatest problems seem likeliest to arise not because of the branches' different functions or even because of their short-term political interests. A problem is most likely to occur when one or the other branch behaves as if the stakes in a particular dispute included an overall adjustment in the relationship of the two branches.

This phenomenon-a preoccupation with the implications of one disagreement for the entire interbranch relationship--seems to have become a conspicuous factor in the prolongation of the Dingell-Gorsuch dispute. When the Justice Department first became involved, the relevant officials may have focused their attention on the discrete question of protecting open investigative files in this particular matter. Similarly, the initial, discrete concern of Representatives Dingell and Levitas may have been rooting out improper partisan influence in EPA prosecutorial decisionmaking. Fueled by misunderstandings, however, about the other branch's knowledge and intentions, the negotiators seem quickly to have shifted their rhetoric to general statements about presidential obligation and congressional prerogative.

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[176] In May 1989, the Senate Select Committee on Intelligence investigated whether certain White House documents relevant to the Iran-Contra matter released during the criminal trial of Oliver North had been provided to the Iran-Contra Committee and, if not, why the failure occurred. The Committee determined that the six documents had not been provided to the committee, but that there was no evidence to suggest that any of the documents had been deliberately withheld. Instead, it appeared that the FBI agents in charge of the original search may not have recognized the relevance of the documents. The committee could not determine with certainty whether a seventh trial document that the Committee had not seen had, in fact, been transmitted. White House records indicated transmittal had occurred. SENATE SELECT COMM. ON INTELLIGENCE, WERE RELEVANT DOCUMENTS WITHHELD FROM THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, 101st Cong., 1st Sess. (Comm. Print 1989).

Once negotiators begin to act as though that level of principle is implicated in their disagreement, accommodation becomes vastly more difficult. In the words of former White House Counsel Fred Fielding: "If both parties are acting in good faith, you can negotiate a resolution to any issue unless or until it becomes an institutional clash. Once that occurs, resolution is very difficult because the issue has changed."[177]

2. The Ingredients of the Negotiating "Atmosphere"

Whether the negotiators "get institutional" is influenced, in turn, by other elements of the negotiating "atmosphere." That atmosphere will vary, first, with the degree to which shared goals do or do not animate Congress and the executive in the subject matter area that Congress is pursuing. The successes of the intelligence committees and the success of recent IRS oversight reflect, in part, a set of shared norms between the elected branches. Both take the defense of national security seriously. Neither wants to compromise national security through inappropriate disclosures of confidential information. Each branch is committed to the value of official integrity, and is aware of the particular sensitivity of tax enforcement in this respect.

In contrast, the areas of trade and environmental policy implicated in the Morton, Duncan, Watt and Gorsuch disputes were highly contentious. There are serious partisan differences over regulatory policy, undoubtedly exacerbating the disputes between OMB and Congress over access to regulatory material. Iran-Contra--the greatest failure of the intelligence committees system--was an executive response to the political certainty that Congress would not support the President's foreign policy goals. In those areas where policy contests are hottest, one can expect the most strident claims of congressional prerogative and the most vigorous executive complaints about congressional "micro-management."

A second critical factor is trust. As noted earlier, a developing distrust between the Office of Legal Counsel and Congressional staff may have been a significant exacerbating factor in the 1982 dispute over EPA's enforcement files. Secretary Watt's weakened credibility with the Dingell Subcommittee likewise aggravated the tone of their information dispute. By contrast, counsel to the Senate Select Committee on Intelligence and to the oversight committee investigating the IRS both cite mutual trust as an important aspect of their committees' successful relationship with the agencies they oversee.[178] In a similar vein, John A. Mintz, formerly general counsel to the Federal Bureau of Investigation, believes that a new mutual trust helped the FBI greatly in developing a satisfactory oversight relationship with Congress in the wake of the 1976 Church Committee investigation into intelligence abuses. Both the personal credibility of Judge William Webster as the agency's new director and the relative stability of staff membership both for the FBI and the Judiciary Committees were critically important factors, in Mintz's view.[179]

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[177] Letter from Fred J. Fielding to Peter M. Shane (Jan. 8, 1990) (on file with author).

[178] Interview with Britt Snyder, staff director and general counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990); interview with Peter S. Barash,

A third factor affecting negotiations is, of course, each branch's perception of the political risks involved in pressing hard for its position. With respect to foreign policy, for example, the President ordinarily operates against a backdrop of deference to executive branch initiative. Many members of Congress, regardless of party, are reluctant to place themselves in the position of appearing publicly to usurp the President's foreign policy prerogatives. At least one experienced staff member in the area of foreign policy oversight reports that this reality of congressional politics enables the executive to persevere in not sharing information on grounds of sensitivity, despite his subcommittee's unblemished record of keeping such information confidential. To subpoena such information would typically be impractical given the immediacy of the subcommittee's needs, and the President knows that the chances are miniscule of either House of Congress enforcing a subpoena for foreign policy information. In contrast, Secretary Duncan's dispute with Congress over the oil import fee was short-lived in part because the Carter Administration, having pledged "open government" in the wake of Watergate, was ill-equipped to invoke executive privilege to defend a hugely unpopular program.

The skill of the particular negotiators involved is also a factor that necessarily affects the process. Negotiators may vary in their understanding of the scope of their authority, their ability to minimize personality conflict, their creativity and flexibility in arriving at solutions, and in their skill at enabling other negotiators to reach compromise solutions without losing face.

A related factor is the orientation of each negotiator to his or her task. Negotiators who are willing to take each problem on its own terms and work pragmatically toward a solution may reach quicker agreements than those who psychologically regard each negotiation as an opportunity to advance broad principles. Negotiators who see a client's success as a "statement" of their own prestige or value may also be less flexible than negotiators whose sense of self-worth is less entwined with a client's success.

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staff director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington, D.C. (Aug. 3, 1990).

[179] Interview with John A. Mintz, former general counsel to the Federal Bureau of Investigation, in Washington, D.C. (Aug. 4, 1989).

C. The Persistent Sources of Tension

The catalogue of factors that potentially shape the quality of a particular negotiation explains why any formally elegant model of that process is likely to depart significantly from reality. Although it is easy to imagine a polar "easy" case[180] and a polar "confrontational" case,[181] the spectrum of possibilities between those poles includes an enormous number of plausible scenarios.

What a review of the law and analysis of the case histories do yield is an understanding of the different kinds of potential tensions that make dispute resolution difficult. Some may be uncontrollable; others, not. Some may be eased through formal procedural mechanisms; others require attitudinal changes, which, of course, are more difficult to implement.

The two baseline factors that are least likely to change are political competition between Congress and the President and the existence of background legal uncertainty. Institutional competition, whether or not colored by partisanship, is an intended aspect of the constitutional design. Differences in party control of the two branches only exacerbate an inherent tension between the executive and legislative arms of government. The likelihood, discussed earlier, that courts will not provide any significant number of new decisions regarding executive privilege helps to perpetuate a state of legal uncertainty in which the competition of different institutional points of view can flourish.

A related attitudinal factor that is also unlikely to change is the difference between the branches' initial premises as to the legitimacy of Congressional interest in the details of executive branch policy making.[182] Administrators frequently complain of congressional "micro-management"--a Congressional unwillingness to confine that body's attention to what, from the executive standpoint, is Congress' proper role of legislation and general policy oversight. The executive chafes at what it believes is Congress' unwillingness simply to live sensibly with the breadth of discretion Congress confers on administrative agencies.

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[180] The easiest case would be a dispute in which (1) the branches are pursuing compatible functions, (2) compromise mechanisms are easy to identify, (3) the information at issue involves a policy area in which the branches' shared values predominate, (4) the negotiators trust one another, (5) it appears risky to be obstreperous, (6) the negotiators are skillful, and (7) the negotiators are pragmatic.

[181] The "worst case" would be a dispute in which (1) each branch is protecting a sensitive function, (2) it is difficult to identify a mechanism for compromise, (3) the information at issue involves a hotly contested policy area, (4) the negotiators are unfamiliar with one another or mutually distrustful, (5) neither branch sees great political risk in pushing hard for its position, (6) the negotiators are not exceptionally skillful, and (7) the negotiators tend to worry more about principle than problem-solving.

[182] For a helpful discussion of the scope of congressional oversight and the variety of perspectives as to its quality and intensity, *see* NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES: THE NEED TO STRIKE A BALANCE AND FOCUS ON PERFORMANCE (Undated).

Congressional representatives, however, tend to dismiss "micro-management" complaints as undervaluing the constitutionally intended legislative primacy in domestic affairs. Congress, from this point of view, has become more interested in "micro" issues because Presidents have (1) attempted to assert more direct presidential control at the "micro" decisionmaking level, and (2) implausibly defended the scope of their unilateral policy making authority under article II of the Constitution. From this standpoint, "micro-management" is a necessary counterweight to the Imperial Presidency. Despite this difference in perspective, certain shifts of attitude--even against a background of uncertainty and competition--could ease negotiations significantly. There are areas in which each branch perceives that its institutional interests are so chronically underweighed by the other branch that an agreement to focus conciliatory attention on just these four areas would, if practicable, have a significant impact.

Congress' chronic procedural complaint is that the executive ignores (or excessively manipulates) the importance to Congress of promptness in providing information. Because most significant legislation requires a hearing process in both Houses, committee mark-up in both Houses, floor debate in both Houses, a conference committee reconciliation, and further floor debate before final passage, the two-year lifespan of Congress substantially limits the time frame in which members can hope to be effective in pushing new legislative initiatives. Additionally, because it is difficult to sustain attention to any particular problem--whether public attention, media attention, or the attention of a member's colleagues--a subcommittee engaged either in oversight or legislative deliberations may feel pressed to act within a short time frame when the issue is "hot." Because of this reality, the appearance of executive temporizing is always likely to provoke congressional resentment.

Congress' chronic substantive complaint is the executive's unwillingness to be more forthcoming in the sharing of foreign policy and national security information. Despite occasional episodes of congressional initiative (or over-initiative), Congress generally is deferential to presidential foreign policy making. Yet, the repeated reluctance to share information--often explained by the executive in terms of both presidential prerogative and a fear of leaks--is a frequent source of frustration to the branch that is expressly charged with powers to appropriate funds, to raise an army and navy, to regulate foreign trade, to implement international law, and to control immigration.[183] Congress regards its "leak" record as better than the executive's and is, of course, unpersuaded by arguments that the president is unilaterally charged to formulate all elements of our foreign and military policy.

Administrators also articulate a procedural frustration--the inability to secure an adjudication of an issue of privilege without submitting to a congressional resolution of contempt. Whether the executive is seriously concerned in this respect is not obvious, however; there is, after all, at least some reason to suppose that greater ease in invoking judicial resolutions to information disputes would ultimately result in less executive control over information.

The executive's substantive concerns, however, are undoubtedly serious. The first is that Congress, from the executive standpoint, is insufficiently sensitive to the delicacy of information-sharing in the context of civil law enforcement. In seeking information regarding criminal law enforcement, Congress appears generally to understand the importance of privacy, of protecting sources and methods of gathering information, of shielding the government's strategic discussions, of not compromising ongoing investigations, and of preserving public confidence in the evenhandedness and depoliticization of law enforcement. The executive perceives, however, that Congress is not respectful of the same values--even when they are equally salient--in the context of law enforcement by a civil regulatory agency.[184]

Executive employees also believe that Congress underweighs the negative impact of oversight on executive branch deliberations when Congress demands the disclosure of deliberative documents representing advice to an administrator from that administrator's personal advisers and immediate subordinates. This concern looms largest in policy making areas, such as social and economic regulation, where political competition predominates over shared values and objectives, and least in such areas as criminal law enforcement, where shared values and objectives predominate. A number of administrators insist that the susceptibility of deliberative memoranda to congressional scrutiny has (1) reduced the willingness of administrators and their support staff to commit their candid positions to paper, (2) increased the incentive for writing advisory documents in a manner that renders those documents virtually inscrutable as a public record, and (3) reduces the quality of decisionmaking by pushing more hard decisions into the context of oral deliberation and away from written analysis.[185]

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[183] U.S. CONST., art. I, §8, cls. 3, 4, 10, 12, and §9.

[184] Interview with Robert A. McConnell, former assistant attorney general in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989). The best publicized recent example of alleged inappropriate interference by members of Congress in civil law enforcement involves the intervention by five Senators with the Federal Home Loan Bank on behalf of Lincoln Savings & Loan, a "failing thrift." Merry, *A Senatorial Effort to Save a Thrift*, CONG. Q. June 24, 1989, at 1594. On former Speaker Wright's possible exercise of undue influence in dealing with the Federal Home Loan Bank Board, see HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, REPORT OF THE SPECIAL OUTSIDE COUNSEL IN THE MATTER OF SPEAKER JAMES C. WRIGHT, JR., 101st Cong., 1st Sess. 192-279 (1989).

It is arguable, of course, that administrators should be indifferent to the political consequences of exposing their staff's advice to Congressional scrutiny. If that advice differs from the administrator's ultimate decision or exposes other problems worthy of congressional investigation, the result will be only that Congress may press the administrator to defend his or her performance, an event entirely appropriate under our system of administrative accountability.

What this position may underweigh, however, is the problem of "agenda overload" for many administrators. Time is among the scarcest resources in Washington. An administrator may wish to avoid the production and subsequent disclosure of candid documents not solely out of apprehension for the political fallout, but also to reduce the time burden that explaining those documents may entail. Even an administrator confident of prevailing in the substance of a policy dispute with Congress has incentives to reduce the burden of oversight in terms of time and effort. Congress perceives arguments of this kind from the executive as manifesting an unwillingness to "take the heat"; it may be, however, that "taking the time" is also a genuine concern.

In sum, if the object of procedural reform is to reduce the time and stress involved in reaching a mutually acceptable resolution of potentially confrontational information disputes between Congress and the executive, that strategy should optimally incorporate each of the following elements:

> 1. Enhancing the branches' recognition of various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information;
>
> 2. Deterring the tendency towards behaving as if the potential stakes in a particular information dispute included an overall adjustment in the relationship of the two branches;

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[185] Interview with Robert P. Bedell, former Administrator, Office of Federal Procurement Policy, Office of Management and Budget, in Washington, D.C. (Aug. 2, 1989); interview with John Cooney, former assistant general counsel, Office of Management and Budget, in Washington, D.C. (Aug. 2, 1989).

> 3. Trading greater executive willingness to accommodate Congress' time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

III. Suggestions for Reform

Over the last twenty years--but most notably during the Watergate period and following the Reagan Administration's EPA imbroglio--numerous legislators and commentators have offered suggestions for procedural reform in the exchange of information between Congress and the executive.[186] Nearly all the proposals that have been discussed involve either (1) prescriptions for the procedure through which executive privilege is asserted, (2) resuscitating Congress' use of its inherent contempt authority, (3) creating some avenue for the civil enforcement of Congress' subpoenas to the executive branch, or (4) strengthening the current criminal law enforcement prospects, most importantly through the authorization for a special prosecutor in executive privilege cases. In contrast to these recommendations for formal changes in the exercise of the branches' respective authorities, this author, in 1987, proffered a fairly elaborate scheme for routinizing certain aspects of the informal interbranch negotiations that currently take place.[187]

Statutory proposals to prescribe the procedure through which executive privilege is asserted have aimed chiefly at insuring that responsibility for the invocation of executive privilege is lodged with the President, and that the privilege is not invoked by subordinate officials. President Nixon's 1969 adoption by memorandum of this very procedure, however, and its subsequent observance by every President since Nixon, has mooted this strategy as an avenue for further improvement.

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[186] The various legislative proposals are discussed, in some cases with suggestions for improvement, in Brand and Connelly, *Constitutional Confrontations Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986); Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DE PAUL L. REV. 692 (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 REC. A.B. N.Y. 177 (1974); Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated*

By Congressional Subpoenas, 21 HARV. J. ON LEGIS. 145 (1984); Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621 (1973); and Rosenthal and Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74 (1977).

[187] See Shane, *supra* note *.

Congress could increase the pressure for the quick resolution of information disputes by invoking its inherent contempt power.[188] Although the Constitution does not mention Congress' investigation or subpoena powers expressly, the Supreme Court has inferred both that Congress has such powers and that, in aid of its powers, Congress may adjudge for itself that a targeted witness or holder of documents is in contempt of Congress. Upon such an adjudication, Congress may provide for the incarceration of the contemnor within the Capitol itself, permitting the defendant to raise any privilege issues in court through a petition for habeas corpus.

Use of the inherent contempt power, however, has obvious disadvantages.[189] Although it does not require the cooperation of other branches, the deliberative process it entails is still time consuming. The spectacle of summary incarceration is politically unseemly, especially if the defendant is a government official. Congress had enough doubts as to the effectiveness of the procedure by 1857 to provide by statute for the executive prosecution of "contumacious" witnesses. Congress has not used the power at all since 1934.[190] Proposals to permit a civil declaratory judgment action or an injunctive suit to enforce a congressional subpoena offer a "cleaner" way of adjudicating an issue of privilege than does the current statutory scheme.[191] Under existing law, an executive officer can secure an adjudication of a privilege claim only by incurring contempt and raising the privilege issue defensively in a criminal prosecution. It would undoubtedly be easier for Congress to pursue a civil remedy than it is for Congress to invoke effectively the criminal process as that process is presently structured.

It should be recognized, however, that the possibility of civil suit would not likely do much to change the current atmosphere of interbranch negotiation. Furthermore, it specifically would not advance the two concerns Congress feels most pressingly, that is, executive failure to respond promptly to all information requests and the executive withholding of foreign policy information.

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[188] For extensive histories and analyses of Congress' contempt power, see J.T. MELSHEIMER, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 76-152 A) (Aug. 12, 1976); and J.R. Shampansky, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 86-83A) (Feb. 28, 1976).

[189] Brand and Connelly, *supra* note 185, at 74-77; Hamilton and Grabow, *supra* note 185, at 151-52.

[190] J.C. Grabow, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 88 (1988).

[191] *E.g.*, Linde, *"A Republic . . . If You Can Keep It,"* 16 HASTINGS CONST. L.Q. 295, 326 (1989).

The reason for supposing that the possibility of a congressional suit to enforce its subpoena would not much alter the existing pattern of negotiation is that such suits, as both branches know, are both time consuming and uncertain.[192] Congress is not likely to authorize a procedure under which suits could be initiated based on a subcommittee vote alone. A full committee vote to authorize suit would require time for the full committee to deliberate, and to persuade the majority of committee members of the appropriateness of the suit and, perhaps, of its likely outcome. Additionally, even if suit is filed under an expedited procedure, the suit--and its possible appeal--could take months. Such a mechanism would not be practicable as a routine device for exacting executive cooperation in information sharing.

Moreover, the areas in which Congress feels most routinely underinformed--on questions of foreign and national security policy--are the areas in which courts are most likely to be deferential to executive claims of privilege. Despite the lack of support for the executive's oft-repeated claim of exclusive authority over all matters touching diplomacy, courts have been reluctant to second-guess particular executive claims that the disclosure of certain information would compromise intelligence sources or methods, or the confidence of other nations' intelligence services in our own.

Despite these problems, Congress might think it worthwhile to enact a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to solve an impasse with the executive branch. In principle, pursuit of such an action should be open either to Congress or the executive once a subpoena issues. The procedure, even if little used, would be preferable to the currently existing criminal process.

The fourth set of proposals--proposals to facilitate recourse to the criminal process--is also unlikely to alter much the existing pattern of negotiating behavior. Proposals to permit the appointment of a special prosecutor to pursue criminal contempt charges respond to one important problem with the application of the current contempt statute to the executive. When a case against an administrator is referred by Congress to a United States Attorney, that official necessarily faces a conflict between the duty to enforce the law and his or her institutional duties to the Department of Justice. Congress cannot confidently expect the pursuit of such a prosecution so long as a Department of Justice appointee must conduct the grand jury and any subsequent trial. Thus, were Congress authorized to apply to a court for the appointment of an independent counsel, it could eliminate a troublesome feature of the current system.

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[192] Brand and Connelly, *supra* note 185, at 83.

Yet, criminal prosecutions are even less promising vehicles for resolving disputes quickly than would be civil suits. Once an indictment is filed, the defendant can no longer purge him- or herself of contempt by complying with the subpoena.[193] This renders much more problematic Congress' ability to engage in an efficient bargaining process with the defendant. Further, the courts are not traditionally friendly to criminal contempt actions. To achieve a conviction, the prosecutor must, of course, prove each element of the statutory offense beyond a reasonable doubt. Should the defendant be acquitted, Congress has no avenue for appeal.

There are also strong policy objections to the creation of a special prosecutor mechanism to resolve executive privilege disputes. Although constitutional objections to judicially appointed prosecutors proved unpersuasive in *Morrison v. Olson*,[194] Justice Scalia forcefully explained the potential that the special prosecutor mechanism has for destabilizing the co-equal relationship of the branches. The Constitution allocates specific tools to Congress for the purpose of checking the executive--most notably, the appropriations, confirmation, and impeachment powers. Permitting Congress at will to prompt the appointment of a special prosecutor goes substantially further in enabling Congress, at little cost to itself, to distract the executive branch from its primary functions and to undermine popular support for the President.[195] When serious indications exist of criminal wrongdoing by executive officials, the potential for destabilization is properly overbalanced by the contribution of the independent counsel mechanism to preserving the rule of law. It is not obvious that there is a comparable public benefit to be gained in information disputes that would justify the destabilizing potential of a special prosecutor in this context.

The various objections to those formal procedural reforms that others have suggested do not mean that nothing should be done. However unlikely the litigation of these disputes may be, a declaratory judgment proceeding would be "neater" than any criminal contempt process. Congress could also sensibly enact the sorts of protective procedures envisioned in the Congressional Right to Information Act proposed in 1973.[196] That bill obligated committees to protect confidential information that agencies received from entities or persons outside the federal government and provided that any breach of confidentiality by a member of Congress would trigger an ethics investigation. Furthermore, Congress could provide for the physical security of confidential information, and permit entities or persons outside the federal government who supply such information to explain their interest in continued confidentiality before any congressional decision to disclose.[197]

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[193] *Id.* at 77.

[194] 108 S.Ct. 2597 (1988).

[195] *Cf.*, *id.* at 2623-25, 2630-31 (Scalia, J., dissenting).

[196] S. 2432, 93d Cong., 1st Sess. 119 CONG. REC. 42101 (1973).

If, however, the elected branches are truly to create conditions for more constructive and less burdensome negotiations, they must focus on procedures that are not dependent on the courts or on the exercise of contempt power. Based, in part, on this author's earlier study of interbranch information disputes, the American Bar Association in 1987 endorsed three such measures for adoption by the elected branches and two areas for congressional study, in order to facilitate the resolution of disputes over executive privilege in a manner that would "take account more effectively of the constitutional responsibilities of each branch and without undue cost to the necessary working relationship of Congress and the Executive."[198] The ABA endorsed another such measure in 1988, pertaining specifically to congressional demands for documents revealing communications between administrators and their personal advisers.[199] These measures, implemented in a manner consistent with the findings of the present study, promise to do more to redirect the energies of the elected branches in information disputes than do the categories of procedural reform discussed earlier.

The centerpiece of a reform effort that is not dependent on the courts would be the negotiation between the branches of a new *modus vivendi* to govern information disputes. This *modus vivendi* would have both a procedural and a substantive component. Under the *modus vivendi*, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the *modus vivendi* would contain agreements aimed at steering negotiations away from categorical questions of prerogative--who is legally entitled to what? --and toward the pragmatic resolution of immediate disputes.

Toward that end, the agreement should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past. Another important procedural component would be the creation of some mechanism for systematic recordkeeping concerning the informal resolution of executive privilege disputes. This set of agreements has the potential to enhance the branches' recognition of the various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information, and to deter treating the stakes in particular information disputes as if they included an overall adjustment in the relationship of the two branches.

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[197] Rosenthal and Grossman, *supra* note 47, at 111-116.

[198] E. Grenier, Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law (Aug. 1987).

[199] A. Bonfield, Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law (Aug. 1988).

It would not be necessary to implement such an agreement through statute. Once an agreement was negotiated, the President could bind the executive branch to its observance through executive order. Congress could adopt the agreement as part of the rules of each House. Such mechanisms would enable each branch to escape the agreement should it prove unworkable.

Yet greater strides could be made to interbranch comity if the agreement, as suggested earlier, traded greater executive willingness to accommodate Congress' time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates. Such a trade could be accomplished in a variety of ways.

Congress, for example, could agree--as recommended by the ABA--not to subpoena:

> from administrative agencies any documents embodying [communications between administrators and their personal advisers], except on the basis of a demonstrated, specific need for such documents.

In determining whether such a need exists, the following factors should be among the criteria considered:

> the nature of Congress' interest in its investigation, the importance to Congress' investigation of the particular material requested, the nature of the agency's interest in not disclosing the material, and the availability to Congress of adequate alternative sources of information.[200]

Additionally, it could negotiate understandings regarding the exchange of civil law enforcement information that show sensitivities similar to those displayed in the context of criminal law enforcement.

The executive could offer some promise for assuring a quick, good faith response to every request, plus quick engagement in negotiations--perhaps under presumptive deadlines--in the event of disagreements. The branches could explore increased congressional access to foreign policy information as a goal, facilitated perhaps by measures akin to those now used for the sharing of classified intelligence.

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[200] American Bar Association Report No. __ (Aug., 1988).

Determining the particulars of these agreements would likely not be easy, but it is fair to say that adversaries throughout the world, under imperatives to cooperate less compelling than those facing Congress and the President, have reached agreements over even knottier issues. That payoff could be considerable, especially if such a *modus vivendi* laid the groundwork additionally for a more bipartisan foreign policy and greater congressional confidence in executive administration of the laws.

One of the other two areas that the ABA in 1987 recommended for congressional study was the possible provision for a central body in Congress with continuing responsibility for negotiation in executive privilege negotiations, akin to the responsibility held in the executive by the Justice Department's Office of Legal Counsel. A final area for study was possible recourse to nonabiding third-party mediation in the most serious disputes. The ABA report, like the article from which it was drawn, mentioned federal judges as possible mediators.[201] Retired members of Congress and former Presidents are also possibilities.

The first of these ideas could be implemented by strengthening and perhaps more fully publicizing to the members of Congress the current roles of the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House. Both offices now operate as repositories of information about past disputes, and sources of legal counsel to individual committees. Any further centralization of negotiating authority, however, is likely to be regarded as too significant a departure from norms of congressional procedure to commend itself to Congress unless and until there is a political disaster under the current structure.

The second idea may well have merit, but would constitute a dramatic innovation, likely requiring statutory implementation. Congress and the executive could quite reasonably decide that consideration of such a mediation mechanism should be postponed until the branches had experimented with the structurally less innovative *modus vivendi* described above. The set of political agreements here outlined is more responsive to the factors producing success or failure in the case studies described in Section II and to the points of agreement and disagreement articulated in the interviews conducted for this study than are proposals for resurrecting Congress' contempt power, creating a civil process other than contempt for enforcing congressional subpoenas, or authorizing the use of independent counsel in information disputes.

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[201] Shane, *supra* note *, at 529-31.

IV. Are Independent Agencies Different?

If the elected branches decided to negotiate the sorts of agreements described in the previous section, a difficult issue to resolve would be the scope of those agencies whose records would be covered by the new *modus vivendi*. The branches could, as a matter of policy, agree to cover any set of agencies they choose. An interbranch "treaty" on information sharing might cover just the Executive Office of the President and its components, or just the core cabinet-level agencies, or just agencies with jurisdiction over environmental policy or any other constellation of agencies. The various jurisdictional possibilities, however, are not necessarily of equal appeal in terms of either their policy or principle sense.

One easily imagined jurisdictional line that does *not* make a good deal of policy or principled sense is the line between those agencies conventionally labeled "executive" and those conventionally labeled "independent." That line, although deeply embedded in separation of powers folklore, is unappealing for two reasons. First, recent Supreme Court opinions cast substantial doubt on the proposition that there are constitutionally distinct categories of agencies called "executive" or "independent." Second, whether there do or do not exist good reasons for withholding or disclosing agency information will rarely have anything to do with an agency's particular structure.

A. The Unitary Nature of the Administrative Agency

The agencies conventionally called "independent" are structured in a variety of ways that are designed to mitigate the influence of partisanship on agency policy.[202] Among the common accoutrements of "independence" are collegial decisionmaking, staggered terms for agency administrators, terms of administrative office longer than a single Presidential term, and quotas on the number of agency members who may belong to either of the major parties. The Constitution is silent on each of these features. Congress has the power to adopt such features, depending entirely on its judgment as to what is "necessary and proper" for the effective functioning of the agency.

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[202] Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608 (1989). The difficulty in finding principled distinctions between so-called "independent" agencies and others is well developed in Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-86 (1984).

The Constitution does speak at least elliptically, however, to a number of issues that are relevant to agency structure, taking as an element of that structure the appropriate relationship between agency administrators and the President or other elected officials. Most obviously, the Constitution provides that the President shall appoint all noninferior administrative officers "by and with the Advice and Consent of the Senate."[203] The Supreme Court has held this provision fully applicable to the Federal Election Commission, an "independent agency," because the FEC is an administrative agency that implements the authority of the United States.[204] Thus, Congress may not, by labeling an agency "independent," deprive the President of his appointments role.

Second, the Constitution--as read by the Supreme Court since *Myers v. United States*[205]--limits the permissible scope of Congress' power to participate in the removal of any officer of the United States. Congress may remove an officer of the United States only through impeachment. So long as Congress permits an administrator to implement the authority of the United States, Congress may reserve for itself no other removal role, even if the administrator is one, such as the Comptroller General, who is widely regarded as an "arm of the legislative branch."[206] Third, because the President is charged to "take Care that the Laws be faithfully executed,"[207] Congress must permit the President to remove, directly or through a subordinate he fully controls, any administrator who is not faithfully executing the laws.[208] Although the full scope of this power has not been elaborated, it presumably includes the power to discharge an official who has broken the law, who refuses to implement the law, or who is performing so poorly as to undermine Congress' purposes in delegating power in the first place.

Fourth, however, even if an administrator is performing power of a sort historically performed almost entirely by officers universally regarded as executive, Congress need not render the administrator susceptible to "at will" discharge by the President.[209] It may be that the President must have plenary removal power to supervise fully the exercise of administrative functions by any official--such as the Secretary of State--who assists the President in discharging an inherent article II function. If an administrator, however, is implementing delegated authority that is not within the scope of the President's inherent article II functions, then any discretion the President has to discharge the administrator depends upon congressional permission--except for the constitutionally guaranteed authority to discharge an officer for failing faithfully to execute the laws.[210]

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[203] U.S. CONST., art. II, §2, par. 2.

[204] Buckley v. Valeo, 424 U.S. 1 (1976).

[205] 272 U.S. 52 (1926).

[206] Bowsher v. Synar, 478 U.S. 714, 746 (1986).

[207] U.S. CONST., art. II, §3.

[208] *Cf.*, Morrison v. Olson, 108 S.Ct. 2597, 2619 (1988). ("This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.")

[209] *Id.* at 2619-21 (limits on presidential supervision of independent counsels do not impermissibly impede President in discharge of his constitutionally vested powers).

The foregoing propositions, all squarely affirmed by recent Supreme Court decisions, assure the President a constitutionally prescribed minimum level of authority with respect to every agency. That an agency has multiple administrators, with lengthy, staggered terms, or that Congress has limited the number of agency administrators who may be members of a particular party, would have no impact on the President's appointment power or on his authority to take care that the laws be faithfully executed. Nor would Congress have more authority to supervise the administrators within such an agency. If displeased with an administrator, it would have no power other than impeachment to remove the official. In these respects, all agencies are "executive."

On the other hand, the relationship that the Constitution promises to the President falls far short of plenary policy control. Only if an administrator is involved in discharging functions constitutionally vested in the President is such control a probable constitutional mandate. Otherwise, the scope of such supervisory power and the scope of authority the President has to remove an executive official are judgments within the discretion of Congress. It follows from this analysis that there is nothing in the constitutionally mandated relationship between administrative agencies and either Congress or the President that suggests that labeling an agency "executive" or "independent" yields (a) greater or lesser authority for the President to control agency information, or (b) greater or lesser authority for Congress to demand information.

B. Agency Structure and the Policy Implications of Information Sharing

The line between independent and executive agencies also seems unhelpful in distinguishing between situations when policy arguments for information disclosure will or will not be persuasive.[211] In part, this is because the agencies are not neatly distinguished by subject matter. Although most foreign policy matters are handled by executive agencies, some "independents," such as the Nuclear Regulatory Commission, have a potential impact on foreign policy and access to classified information that is of no less concern to the President than the agenda of the State Department. Sensitive financial information exists both in the "independent" Securities and Exchange Commission and in the "executive" Department of the Treasury. Health and safety, antitrust, energy, and transportation are additional critical policymaking areas in which both executive and independent agencies are involved.

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[210] *See generally* Shane, *supra* note 201.

[211] Strauss, *supra* note 201, at 654-660.

Just as important, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information. Congressional demands for information, as noted above, coincide with legislative deliberations, ordinary oversight, confirmation investigations, and probes into alleged wrongdoing. The fact that the context in which a particular one of these activities is occurring involves an "independent" agency or an "executive" agency is irrelevant to whether Congress will find particular information either relevant or helpful to its tasks.

Similarly, the interests in nondisclosure catalogued above--protecting defense and foreign policy secrets, confidential financial information, the integrity of administrative policy deliberations, personal privacy, and law enforcement--do not vary depending on whether those interests arise in an "independent" or "executive" agency context. State secrets are sensitive, wherever held. Financial information is no more or less sensitive because held by the Internal Revenue Service or the Federal Reserve Board. The integrity of Federal Trade Commission investigations and deliberations is of no less concern than investigations and deliberations by the Environmental Protection Agency or the Justice Department. The personal privacy interests of ICC employees are presumably no different from those of Defense Department staff.

In sum, to draw a line in information handling between agencies conventionally labeled "executive" and others conventionally labeled "independent" may have political appeal. There would be no constitutional barrier to the branches negotiating an informal agreement that does treat these categories differently. It would be a mistake, however, simply to assume either that constitutional doctrine or policy analysis dictates different treatment. They do not.

V. Conclusion

The foregoing study supports the following conclusions with respect to improving the resolution of disputes between Congress and the executive over congressional access to information:

> 1. Congress should consider enacting a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to solve an impasse with the executive branch over access to information.
>
> 2. Congress and the President should consider negotiating an agreement, implemented through congressional rules and an executive order, regarding negotiations over the sharing of sensitive information.
>
> A. Such an agreement should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past.
>
> B. Such an agreement should involve the creation of some mechanism for systematic recordkeeping concerning the informal resolution of executive privilege disputes to enhance the branches' recognition of the various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information, and to deter treating the stakes in particular information disputes as if they included an overall adjustment in the relationship of the two branches.
>
> C. Negotiations regarding an informal agreement should focus on the possibility of trading greater executive willingness to accommodate Congress' time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing

advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

3. Congress should fully orient its members to the roles of the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House as repositories of information and sources of counsel to individual committees in negotiating disputes over information.

4. In resolving disputes over information, all three branches of the federal government should avoid presuming different treatment for contested information depending on whether the information is held by agencies conventionally labeled "executive" or "independent."

APPENDIX

Government Officials Interviewed for Study

This report benefitted greatly from the willingness of a number of past and present employees of Congress or the executive branch to share their views and experiences with the author. Because the following people did not insist on confidentiality, I am able to thank them publicly for their generosity.

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Report for Recommendation 90-8

Rule and Policy Making for the Medicaid Program: A Challenge to Federalism

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

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I. Introduction

The Medicaid program provides health and long term care insurance for some poor. Since its inception in 1965, the program has had a dramatic impact on improving access to health care services among the poor and thereby improving their health status.[1] Between 1965 and 1974, infant mortality rates in the United States declined 32 percent and death rates for young children from specific diseases, i.e.,, influenza and pneumonia, declined as much as 48 percent.[2] Immediate and substantial gains were also made regarding access to health care services. The proportion of poor failing to see a physician in a two year period fell from 28 percent in the mid-1960s to 17 percent in 1973.[3] Indeed, some evidence indicates that by the late 1970s, the poor saw physicians more often on average than the nonpoor.[4] In sum, the Medicaid program has been and continues to be a critical program for assuring health care for American society's most vulnerable members.

The Health Care Financing Administration (HCFA) in the Department of Health and Human Services (HHS) administers the Medicaid program at the federal level. However, it is the states that have primary responsibility for the Medicaid program. There are many joint federal/state programs, but Medicaid is the largest and the most complicated. It comprises nearly 3 percent of the federal budget[5] and is one of the largest components of state budgets. In fiscal year 1988, the federal government and states spent $52.3 billion on the Medicaid program for 22.9 million people.[6]

Given the magnitude of the Medicaid program and the crucial nature of its mission, the relationship between HCFA and the states in the administration of the Medicaid program is important and complex. This complexity has been exacerbated in recent years due to extensive fiscal pressures on the federal budget and the resulting efforts of the Executive Branch, as well as the states, to contain costs in the Medicaid program. The complexity has also been aggravated by a struggle over the fundamental mission of the Medicaid program between the administration of an ideologically conservative presidential administration and a more liberal Congress controlled by the opposition party.

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[1] *See* K. Davis & C. Schoen, Health and the War on Poverty: A Ten Year Appraisal (1978); Davis, Gold & Makuc, *Access to Health Care for the Poor: Does the Gap Remain?*, 2 Ann. Rev. Public Health 159 (1981); Davis & Rowland, *Uninsured and Underserved: Inequities in Health Care in the United States*, 61 Milbank Mem. Fund Q. 149 (1983); Blendon, *The Problems of Cost, Access, and Distribution of Medical Care*, 115 Daedalus 119 (1986).

[2] K. Davis & C. Schoen, *supra* note 1, at 204.

[3] *Id.* at 205.

[4] L. Aday, R. Anderson & G. Fleming, Health in the U.S.: Equitable for Whom? (1980).

[5] Executive Off. of the President, Off. of Management and Budget, Budget of the United States Government, Fiscal Year 1990 (1989).

[6] Off. of Nat'l Cost Estimates, *National Health Expenditures*, 1988, 11 Health Care Fin. Rev. 1, 22 (1988).

This study examines the relationship between HCFA and the states in working out this struggle and specifically in implementing an enormous volume of federally generated changes in the Medicaid program since 1981. In a general sense, this article tells the story of a federal agency trying to craft rules and policies to implement mandated changes that are often opposed by the presidential administration in charge. It is also a story of the resulting confusion and sometimes chaos when the agency directs states to implement congressionally-mandated changes within short time frames and without regard to conventional rule and policy making procedures which both federal and state agencies customarily follow. The story of the Medicaid program since 1981 is an interesting case study of the tensions created for a federal agency and the states when the executive and legislative branches of the federal government repeatedly fail to work out a political consensus about the mission of an important government program. This article concludes with recommendations for reforms in the rule and policy making process of the Medicaid program.

II. Background on the Medicaid Program

Congress established the Medicaid program in 1965 along with Medicare, a program to assist the elderly in meeting the high cost of health care.[7] At the time, government health insurance was controversial, particularly within the medical profession and hospital community. Nevertheless, following the landslide victory of Democrat Lyndon Baines Johnson and an overwhelmingly Democratic Congress, passage of government health insurance for the elderly was inevitable.[8]

In the extraordinary compromise that gave birth to the Medicare and Medicaid programs, Congress borrowed from the two basic models in the Social Security Act. Congress adopted the welfare model for the Medicaid program's basic design.[9] Like other welfare programs under the Social Security Act, Medicaid is jointly administered by the states and the federal government, financed by state and federal general revenues, and bases eligibility on a means test. Congress used the social insurance model for the Medicare program, which is characterized by federal administration, financed through a separate wage tax, and bases eligibility on beneficiary contributions during working years.

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[7] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§1396-1396s (Medicaid) and 42 U.S.C. §§1395-1395ccc (Medicare) (1988)).

[8] *See generally* R. Stevens & R. Stevens, Welfare Medicine in America: A Case Study of Medicaid 19-53 (1974).

[9] *Id.* at 5-17.

Use of the welfare model for the Medicaid program has been problematic. When the Medicare and Medicaid programs proved to be far more expensive than anticipated,[10] the Medicaid program was vulnerable politically because of its welfare character. For example, President Ronald Reagan, who came to office in 1981 with plans to curtail federal commitments to all entitlement programs, was able to achieve substantial cutbacks in the Medicaid program in part because of public and congressional perceptions that Medicaid was a welfare program.[11]

The welfare model also permits great diversity among state programs. This diversity results in marked disparities in the treatment of similarly situated individuals across states in terms of who receives Medicaid benefits and how much of these benefits they receive.[12] Because states have great flexibility in structuring eligibility, benefits, coverage, and payment policies, the Medicaid program is really 50 very different programs serving different populations and providing different benefits. Evidence of the diversity among states is the disparity between Medicaid expenditures for states of similar size. For example, in 1985, New York with over 16 million people spent $7.5 billion on its Medicaid program and Texas, with a population of comparable size, spent only $1.4 billion.[13] Similarly, despite having the same number of citizens in poverty, Wisconsin spent $942 million in Medicaid expenditures while Oklahoma spent only $460 million in 1985.[14] These variations occur mainly because of the flexible eligibility rules which give states great latitude in setting income and resource standards for Medicaid eligibility for their residents.[15] In sum, historically, there has been no pretense of uniformity in the treatment of similarly situated individuals across states in terms of eligibility as well as the type and level of benefits received.[16] This lack of uniformity may arguably be undesirable from an equity perspective but it follows inevitably from Congress' decision to adopt the welfare model under the Social Security Act which gives states great authority to structure programs within federal constraints.

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[10] *See* Staff of Senate Comm. on Finance, 91st Cong., 1st Sess., Medicare and Medicaid: Problems, Issues, and Alternatives 41-44 (Comm. Print 1970).

[11] *See* Omnibus Budget Reconciliation Act of 1981, §§2161-2184, Pub. L. No. 97-35 [hereinafter "OBRA '81"], 95 Stat. 357, 803-16 (codified at scattered sections of 42 U.S.C. §§1396-1396s (1988)). *See infra* note 142 and accompanying text.

[12] *See* T. Grannemann & M. Pauly, Controlling Medicaid Costs: Federalism, Competition, and Choice 21-29 (1983); Cromwell, Hurdle & Schurman, *Defederalizing Medicaid: Fair to the Poor, Fair to Taxpayers?*, 12 J. Health Pol., Pol'y & L. 1 (1987). *See also* McDevitt & Buczko, *Medicaid Program Characteristics and their Consequences for Program Spending*, 7 Health Care Fin. Rev. 3 (1985).

[13] Schneider, *Intergovernmental Influences on Medicaid Program Expenditures*, 148 Pub. Admin. Rev. 756, 757 (1988). *See generally* Bachman, Altman & Beatrice, *What Influences a State's Approach to Medicaid Reform*, 25 Inquiry 243 (1988).

[14] Schneider, *supra* note 13, at 757.

Because of its state/federal character, the Medicaid program raises the fundamental issues of federalism: are all states committed and capable of executing the responsibility of financing health care for the poor even with substantial federal assistance,[17] and are resulting disparities in the treatment of protected groups by states tolerable? Students of federalism have often observed and documented that states tend to be more conservative politically and promote dominant economic interests to enhance the business opportunities in the state through low taxes and limited debt--policy goals which conflict with expanding state welfare programs.[18] Nevertheless, promotion of increased responsibility of states over social programs was a major objective of the Executive Branch during the 1980s.[19]

The design of the Medicaid program has been the subject of debate since its inception. Proposals for national health insurance in the late 1960s and 1970s called for the elimination of state responsibility for health insurance for the poor except for long-term care.[20] In the 1980s, the debate continued in a different key. The Reagan administration proposed a "New Federalism" in which the federal government would assume complete responsibility for Medicaid and states would assume complete responsibility for Aid to Families with Dependent Children ("AFDC").[21] In the 1980s, both the American Medical Association and the American Hospital Association called for major reforms in the Medicaid program to expand health insurance coverage for the poor and uninsured.[22] Also, private foundations and other prestigious coalitions of health sector interest groups engaged in similar analyses of the Medicaid program's design and offered proposals for reform.[23] Physician and hospital organizations concerned with child health have been particularly vocal advocates of Medicaid reform out of concern for the declining health and economic status of America's children in the 1980s.[24]

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[15] *See infra* notes 79-111 and accompanying text.

[16] *See* K. Erdman & S. Wolfe, Poor Health Care for Poor Americans: A Ranking of State Medicaid Programs (Pub. Citizens Health Res. Group, 1988).

[17] *See* Thompson, *New Federalism and Health Care Policy: States and the Old Questions*, 11 J. Health Pol., Pol'y & L. 647, 648 (1986).

[18] *Id.* at 648-49.

[19] *See* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987). This Executive Order clearly states a policy preference for state responsibility for social problems and programs and requires that federal agencies review regulations and other agency actions to promote the following federalism principles:

> (e) In most areas of government concern, the States uniquely possess the constitutional authority, the resource, and the competence to discern the sentiments of the people and to govern accordingly...
>
> (f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. *Id.* at §2, 52 Fed. Reg. 41,485.

[20] *See* House Subcomm. on Health of the Comm. on Ways and Means, 94th Cong., 2d Sess., National Health Insurance Resource Book (1976); Dep't of Health and Human Services, Off. of Ass't Sec'y for Planning and Evaluation, National Health Insurance Working Papers--

In 1990, a coalition of children's advocacy groups, hospitals, health insurers and business groups in the "Children's Medicaid Coalition" successfully lobbied Congress to expand Medicaid benefits for poor children extensively in the Omnibus Budget Reconciliation Act of 1990.[25] Admitting that poor children are not their natural constituency, a Chamber of Commerce

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Department of Health and Human Services (1980). *See also* K. Davis, National Health Insurance: Benefits, Costs, and Consequences (1975); National Health Insurance: What Now, What Later, What Never (M. Pauly ed. 1980).

[21] *President's Federalism Initiative: Hearings Before the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982).

[22] *See, e.g.*, Am. Med. Ass'n Ad Hoc Comm. on Medicaid, *Including the Poor* (1989); Tallon, *A Health Policy Agenda Proposal for Including the Poor*, 261 J. Am. Med. Ass'n 1044 (1989); Thorp, Siegel & Dailey, *Including the Poor: The Fiscal Impacts of Medicaid Expansion*, 261 J. Am. Med. Ass'n 1003 (1989); Am. Hosp. Ass'n, Policy Strategy on Care for the Indigent (1986); Am. Hosp. Ass'n, Special Comm. on Care for the Indigent, Cost and Compassion: Recommendations for Avoiding a Crisis in Care for the Medically Indigent (1986).

[23] *See, e.g.*, Nat'l Health Care Campaign, Health Care for All (1987); Nat'l Study Group on State Medicaid Strategies, Restructuring Medicaid: An Agenda for Change (1983); Moloney, A Commonwealth Fund Paper: What's Being Done about Medicaid? (1982); New Approaches to the Medicaid Crisis (R. Blendon & T. Moloney ed. 1982).

[24] *See, e.g.*, M. McManus & S. Davidson, Medicaid and Children: A Policy Analysis (Am. Acad. of Pediatrics, 1982); Am. Acad. of Pediatrics, Comm. on Child Health Financing, *Medicaid Policy Statement*, 77 Pediatrics 762 (1986); *see also*, S. Laudicina & D. Lipson, Medicaid and Poor Children: State Variation in Eligibility and Service Coverage (Nat'l Ass'n of Children's Hospitals and Related Institutions, 1988).

[25] Omnibus Budget Reconciliation Act of 1990, 4601-4607, Pub. L. No. 101-508 [hereinafter "OBRA '90"], 104 Stat. 1388 (codified at scattered sections of 42 U.S.C. 1396a). *See* Pear, *Unlikely Allies Bring Expansion of Medicaid*, N.Y. Times, Nov. 4, 1990, at 1. *See* note 97 *infra* and accompanying text.

spokesperson stated that "Expansion of Medicaid to cover additional poor children will produce a better work force."[26]

The design and future of the Medicaid program is also currently being debated in the context of proposals to provide government health insurance for the uninsured.[27] It is estimated that, in 1987, nearly 37 million Americans, about 15.5 percent of the population, had clearly inadequate or no health insurance.[28] The debate is also shaped by the current concern about how to finance long term care for the elderly and disabled.[29] The Medicaid program is a major financier of long term care services in the United States. In 1986, the Medicaid program paid 41 percent of expenditures for nursing home care.[30]

Specifically, the United States Bipartisan Commission on Comprehensive Health Care, known as the "Pepper Commission," recently announced its proposal for universal health and long term care insurance coverage for all Americans following a congressionally-mandated study.[31] The proposal calls for a sharply reduced role for the Medicaid program partly because of the known complexity for program beneficiaries.[32]

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[26] Pear, *supra* note 25, at 14. *See infra* note 94 and accompanying text.

[27] *See, e.g.,* Intergovernmental Health Policy Project, Major Changes in State Medicaid and Indigent Care Program, 1988 (1989); Cong. Res. Service., *Insuring the Uninsured: Options and Analysis* (Oct. 1988); Cong. Res. Service., *Health Insurance and the Uninsured: Background Data and Analysis* (May 1988); Wilensky, *Viable Strategies for Dealing with the Uninsured*, 6 Health Aff. 33 (1987); Bovbjerg & Kopit, *Coverage and Care for the Medically Indigent: Public and Private Options*, 19 Ind. L. Rev. 857 (1986); Wilensky & Berk, *The Health Care of the Poor and the Role of Medicaid*, 1 Health Aff. 50 (1982).

[28] P. Short, A. Monheit & K. Beauregard, Uninsured Americans: A 1987 Profile (Nat'l Cent. for Health Services Res. and Health Care Technology Assessment, 1988).

[29] *See, e.g.,* Intergovernmental Health Policy Project, State Changes in Medicaid and Indigent Care Programs, 1988 1 (1989); Comm. on Nursing Home Reg., Inst. of Med., Improving the Quality of Care in Nursing Homes (1986); *Long Term Care in America: The People's Call for Federal Action: Hearings before the House Select Comm. on Aging*, 99th Cong., 1st Sess. (1985); *Budget Issues Related to Long term Health Care Coverage: Hearings Before the Task Force on Health of the House Comm. on the Budget*, 100th Cong., 1st Sess. (1987). *See generally* A. Rivlin & J. Weiner, Caring for the Disabled Elderly: Who Will Pay? (1988).

[30] House Comm. on Energy and Commerce, 100th Cong., 2d Sess., Medicaid Source Book: Background Data and Analysis 357 (Comm. Print 1988) [hereinafter Medicaid Source Book].

[31] Medicare Catastrophic Coverage Act of 1988 §401-08, Pub. L. No. 100-360, [hereinafter "MCCA '88"], 102 Stat. 683, 765-68.

[32] U.S. Bipartisan Comm'n on Comprehensive Health Care (The "Pepper Comm'n"), 101st Cong., 1st Sess., Recommendations to Congress: Access to Health Care and Long term Care For All Americans, (1990).

There are some disturbing facts about the poor, their health care needs, and the Medicaid program that lie at the heart of this debate. These facts have inspired Congress to enact many of the benefit expansions in the Medicaid program, discussed below,[33] since 1981. While child poverty rose during the early 1980s, from 16 percent of all children in 1979 to 20 percent by 1983,[34] AFDC and Medicaid coverage of poor children declined.[35] Further, progress in reducing infant mortality rates was slowed with the rate for black infants being twice the rate for white infants.[36] Perhaps most disturbing, is that the number of poor, with incomes below the federal poverty level, actually served by Medicaid sharply declined between the years 1979 and 1984. In 1979, Medicaid covered 84 percent of the poor, but by the mid-1980s, only 60 percent of the poor were covered.[37]

III. Program Design

The Medicaid program is a health insurance program jointly financed and administered by the federal government and the states. State participation in the program is optional.[38] Title XIX of the Social Security Act,[39] sets forth: (1) mandatory features a state program must contain to qualify for federal financial support; (2) program options that states can elect to include; and (3) program areas for which states can get waivers of federal program requirements to adopt unique state approaches to providing and paying for health care services for Medicaid beneficiaries.

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[33] *See supra* notes 142-205 and accompanying text.

[34] Children's Defense Fund, A Vision for America's Future, An Agenda for the 1990s: A Children's Defense Fund Budget (1989).

[35] Rowland, Lyons & Edwards, *Medicaid: Health Care for the Poor in the Reagan Era*, 9 Ann. Rev. Pub. Health 427, 431-34 (1988). *See also* S. Laudicina & D. Lipson, *supra* note 24.

[36] *Infant Mortality Rates: Failure to Close the Black-White Gap: Hearings Before the Subcomm. on Oversight and Investigations and the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. (1984). *See also* Regula, *National Policy and the Medically Uninsured*, 24 Inquiry 48, 52 (1987).

[37] *Id.*

[38] Until recently, Arizona did not participate in the Medicaid program and has only participated with a unique demonstration program since the early 1980s. *See* Vogel, *AHCCS: A New MedicareMedicaid Model in Arizona*, 309 New Eng. J. Med. 934 (1983); McCall, Henton, Crane, Haber, Freund & Wrightson, *Evaluation of the Arizona Health Care Cost-Containment System*, 7 Health Care Fin. Rev. 77 (1985).

[39] 42 U.S.C. §§1396-1396s (1988).

The federal government matches state dollars expended on the Medicaid program, but at different rates depending on the state's relative per capita income.[40] Match rates range from 78.42 percent for Mississippi, to the minimum rate of 50 percent which twelve states and the District of Columbia received in fiscal year 1986.[41] The federal match comes from annual congressional appropriations, and the state contribution usually comes from state general revenues. In fiscal year 1987, the federal government paid about 54 percent of total Medicaid expenditures.[42]

A. Program Administration

To participate in the Medicaid program, a state must submit a "state plan" to HCFA describing the nature and scope of its Medicaid program and giving assurances as to how it will meet federal requirements.[43] The state plan must assure that a single state agency administers the state's program.[44] Further, each state is required to have a Medical Care Advisory Committee to advise the state agency.[45] Federal law also requires that the state's program be in effect throughout the state[46] and that beneficiaries have the freedom to choose their providers.[47]

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[40] *Id.* at §1396; 42 CFR §§304.10 (1988).

HCFA pays the federal match on a quarterly basis for the next quarter based on an estimate provided by the state. When HCFA and the state determine what the actual expenditures were for the quarter in question, HCFA reduces or increases the federal Medicaid payment for the next quarter accordingly. 42 U.S.C. §1396b(d) (1988).

[41] Health Care Financing Admin., Program Statistics: Analysis of Medicaid Program Characteristics, 1986 119 (Table 67) (1987).

[42] *Id.*

[43] 42 U.S.C. §1396a(a) (1988); 42 CFR §430.10 (1988).

[44] 42 U.S.C. §1396a(a)(5) (1988).

[45] *Id.*; 42 CFR §431.12 (1988).

At least one court enjoined implementation of a state's plan to reduce coverage and reimbursement rates because the state's Medical Care Advisory Council was not consulted and the council did not include consumers or Medicaid recipients. Jennings v. Alexander, 518 F. Supp. 877 (M.D. Tenn. 1981), *aff'd in part and rev'd in part*, 715 F.2d 1036 (6th Cir.), *rev'd sub nom.* Alexander v. Choate, 469 U.S. 287 (1983). *See also* Missisippi Hosp. Ass'n v. Heckler, 701 F.2d 511 (5th Cir. 1983).

[46] 42 U.S.C. §1396a(a)(1) (1988).

[47] *Id.* at §1396a(a)(23).

1. Rule and Policy Making

The process for making rules and policies under the Medicaid program is complex in large part because of the shared federal and state responsibility for the program. To implement many program changes, HCFA often promulgates legislative rules pursuant to §553 of the Administrative Procedure Act (APA).[48] The Social Security Act expressly accords the Secretary of HHS authority to promulgate rules and regulations "as may be necessary for the efficient administration of functions" under the Social Security Act.[49] Although rules pertaining to Medicaid benefits are exempt from §553 rulemaking requirements under §553(a)(2),[50] HHS announced in 1971 that it would generally observe §553 in rulemaking for its programs.[51]

More often, HCFA issues interpretative or procedural rules and general statements of policy in its manuals which are directed at personnel in state Medicaid agencies and HCFA regional offices. Most of these instructions are compiled in the State Medicaid Manual[52] and other HCFA manuals and are updated periodically through "transmittals."[53] Others are issued as serially numbered program memoranda[54] or simply as letters from HCFA to states outlining various policy changes. In some cases, HCFA will prepare a "preprint" of a state plan amendment containing the policy change for states to incorporate into their state Medicaid plans.

States must then go through their own procedures for implementing the federal policy change and modify their own Medicaid program policies. To make major changes in their programs and also to respond to changes in federal law, rules, and policy, states must submit a "state plan amendment" to HCFA for approval.[55] Whenever a state plan amendment is submitted to HCFA, HCFA must determine, within 90 days, whether it conforms to federal requirements.[56] HCFA may request additional information from the state and, once HCFA receives the information, HCFA has an additional 90 days on which to act on the state plan amendment.[57] If dissatisfied with HCFA's determination, a state may seek reconsideration from HHS within 60 days.[58] A state may then obtain judicial review of HHS' final decision not to approve a state plan or state plan amendment in the United States Court of Appeals for the circuit in which the state is located.[59]

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[48] 5 U.S.C. §553 (1988).

Section 553 of the APA requires that agencies provide notice and an opportunity for the public to participate in the rulemaking proceeding. For interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice, compliance with §553 notice-and-comment rulemaking procedures is not required. *Id.* at §553(b)(3).

[49] 42 U.S.C. §1302 (1988).

[50] 5 U.S.C. §553(a)(2) (1988).

[51] Dep't of Health, Educ. & Welfare, Notice, Public Participation in Rulemaking, 36Ft. Reg. 2532 (1971).

[52] Dep't of Health & Human Services, Health Care Fin. Admin., State Medicaid Manual (1989).

[53] Other manuals having program instructions related to the Medicaid program are: U.S. Dep't of Health & Human Services, Health Care Fin. Admin., HCFA Regional Office Manual (1989); U.S. Dep't of Health & Human Services, Health Care Fin. Admin., State Operations Manual (1989); U.S. Dep't of Health & Human Services, Health Care Fin. Admin., Third Party Liability in the Medicaid Program: A Guide to Successful State Agency Practice (1989). *See generally*, U.S. Dep't of Health & Human Services, Health Care Fin. Admin., Information on Availability of Medicare/Medicaid Manuals (1990).

[54] Health Care Fin. Admin., Medicaid Program Memoranda (1988).

Some states have laws requiring that their legislatures enact laws to implement the new federal policy, a process that may cause considerable delay because of the sporadic schedules of many state legislatures. A state also has to promulgate its rules under its own administrative law requirements. Many states have rulemaking procedures that are comparable to notice-and-comment rulemaking under §553 of the APA.[60] Indeed, most states require twenty or more days notice of the rulemaking proceeding as well as some opportunity for public participation, often through a mandated oral hearing.[61] Moreover, many states require such procedures for all rules whether or not the agency intends them to be legislative or merely interpretative or procedural rules.[62]

2. Enforcement of Federal Requirements

a. Compliance Actions

HCFA has several methods to ensure state compliance with federal requirements. One is a compliance action through which HCFA makes a determination that the state plan or the state's implementation of the plan is out of compliance with federal Medicaid requirements in some respect.[63] In this action, HCFA may withhold payment of all or part of federal matching funds prospectively only until the state remedies the noncompliance issue.[64] As a practical matter, HCFA endeavors to negotiate most noncompliance issues with the state. If negotiations break down, a state may obtain reconsideration of HCFA's decision within 60 days[65] and a formal administrative hearing before a HCFA official.[66] Judicial review of HHS' final decision is available in the United States Court of Appeals for the circuit in which the state is located.[67]

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[55] 42 CFR §430.12(c) (1988).

An approved plan amendment is usually effective from the first day of the quarter in which it was submitted. *Id.* at §430.20. Also, as of 1981, if HCFA takes no action on the plan amendment, it is automatically approved after 90 days. *Id.* at §430.16(a); OBRA '81, §2177, 95 Stat. 357, 813 (current version at 42 U.S.C. §1396n(f) (1988)).

[56] 42 U.S.C. §1316(a)(1) (1988).

[57] 42 CFR §430.16(a) (1988).

[58] *Id.* at §1316(a)(2).

[59] *Id.* at §1316(a)(3). *See infra* note 65 and accompanying text.

[60] *See* B. Schwartz, Administrative Law §4.13 (2d ed. 1983).

[61] *Id.*

[62] *Id.*

b. Disallowance Actions

Another administrative process addressing noncompliance with federal requirements is the disallowance action in which HCFA retrospectively disallows the federal match for state Medicaid expenditures on grounds that the expenditure did not meet federal requirements. The statute does not directly authorize a disallowance action except with respect to the state's right to reconsideration in Social Security Act §1116(d).[68] The disallowance action is predicated on the statutory provisions pertaining to federal payment of states,[69] and federal Medicaid regulations do outline a "disallowance" action.[70] Most issues over compliance with federal program requirements are raised in the context of a disallowance action[71] rather than a noncompliance action.[72]

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[63] 42 U.S.C. §1396c (1988); 42 CFR §430.10-.20 (1988).

[64] 42 U.S.C. §1316c (1988); 42 CFR §430.35 (1988).

[65] 42 U.S.C. §1316(a)(2) (1988); 42 CFR §430.18(a) (1988).

[66] 42 CFR §430.18 & 430.60-.104.

[67] 42 U.S.C. §1316(a)(3) (1988); 42 CFR §430.38 (1988).

[68] 42 U.S.C. §1316(d) (1988).

[69] *Id.*

[70] 42 CFR §§430.42-430.48 (1988).

[71] *See, e.g.,* Bowen v. Massachusetts, 487 U.S. 879, 882 n.1 (1988), *aff'g in part, rev'g in part*, 816 F.2d 796 (1st Cir. 1987); Massachusetts v. United States, 815 F.2d 778 (1st Cir. 1988); Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524 (1985); Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441 (D.C. Cir. 1985); Minnesota *ex rel.* Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983); Massachusetts v. Secretary, 749 F.2d 89 (1st Cir. 1984), *cert. denied*, 472 U.S. 1017 (1984); Illinois Dep't of Pub. Aid v. Schweiker, 707 F.2d 273 (7th Cir. 1983); Massachusetts v. Departmental Grant Appeals Bd., 698 F.2d 22 (1st Cir. 1983); Medical Services Admin. v. United States, 590 F.2d 135 (5th Cir. 1979); County of Alameda v. Weinberger, 520 F.2d 344 (9th Cir. 1975); Virginia v. Bowen, 683 F. Supp. 148 (W.D. Va. 1988); Delaware Div. of Health & Social Services v. DHHS, 665 F. Supp. 1104 (D.Del. 1987); Indiana Dep't of Pub. Welfare v. Bowen, 686 F. Supp. 692 (S.D. Ind. 1987); Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977).

If a disallowance issue is not resolved, the state can appeal HCFA's decision to the Departmental Appeals Board (DAB) in HHS.[73] A dissatisfied party can obtain reconsideration by the board on grounds of a clear error of fact or law.[74] Unlike compliance actions, there is no express statutory authority for judicial review of disallowance actions. Section 1116 of the Social Security Act permits a state to obtain the Secretary's reconsideration of a disallowance.[75] Although there has been confusion about the availability of judicial review in disallowance decisions in the past, at least five circuit courts and the Supreme Court, in Bowen v. Massachusetts,[76] have agreed that states may seek judicial review of the Secretary's final decision in federal district court.[77]

c. Quality Control System

Another important program for enforcing federal requirements is the "quality control" system established in the late 1970s to monitor state decision-making on eligibility and claims and thereby contain costs in the Medicaid program.[78] The chief purpose of this quality control program is to identify errors in eligibility determinations, coverage of services or payment of

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[72] *See, e.g.*, Connecticut Dep't of Pub. Welfare v. DHEW, 448 F.2d 209 (2d Cir. 1971); Cubanski v. Heckler, 781 F.2d 1421 (9th Cir. 1986).

[73] 42 CFR Pt. 430 (1988); 45 CFR Pt. 16 (1988). *See generally* Cappalli, *Model for Case Management: The Grant Appeals Board*, 1986 ACUS 663; Admin. Conf. of United States, Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7 (1988).

This recommendation proposed several measures to facilitate adjudication before the board including step-by-step time goals, expedited options (particularly for small cases) adoption of questioning techniques by the hearing officer to develop the record on key points, joint consideration of cases with common issues, use of mediation, etc. *Id.* Recently, DAB has taken a more active role in promoting mediation to resolve disputes. *See* Dep't of Health and Human Services, Dep't Appeals Bd., Mediation: The Fast, Low Cost Alternative, 1989.

[74] 45 CFR §16.13 (1988).

[75] 42 U.S.C. §1316(d) (1988).

[76] 487 U.S. 879 (1988).

[77] Bowen v. Massachusetts, 816 F.2d 796 (1st Cir. 1987), *aff'd in part, rev'd in part*, 487 U.S. 879 (1988); Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441 (D.C. Cir. 1985); Minnesota *ex rel.* Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983); Department of Pub. Aid v. Schweiker, 707 F.2d 273 (7th Cir. 1983); County of Alameda v. Weinberger, 520 F.2d 344 (9th Cir. 1975).

[78] 42 U.S.C. §1396u(3) (1988); Final Rule, Medicaid Quality Control (MQC) System, 43Fed. Reg. 45,188 (Sept. 29, 1978) (codified as amended at 42 CFR §§431.800-431.804 (1988)); Health Care Fin. Admin., State Medicaid Manual, Part 7 (1988).

providers through the review of a sample of Medicaid claims.[79] The error rate in the sample, based on those claims improperly paid, is assumed to be the error rate for all of the state's Medicaid claims. If this error rate is greater than three percent, federal payment for all Medicaid claims is reduced by a percentage equal to the excess error rate. This penalty is imposed in lieu of a disallowance for a specific error.[80]

B. Eligibility, Benefits and Coverage Requirements

1. Eligibility

The eligibility requirements for the Medicaid program are complex and, frankly, byzantine. Congress initially predicated Medicaid eligibility on eligibility for the Aid to Families with Dependent Children (AFDC)[81] and the Supplemental Security Income (SSI) programs.[82] Since Medicaid's inception, Congress has repeatedly changed eligibility requirements to address specific needs.[83] The result of such eligibility expansions is a highly technical, virtually incomprehensible body of Medicaid eligibility law.

As a political compromise to states concerned about an expensive increase in the number of Medicaid beneficiaries with the creation of the SSI program in 1972,[84] section 209(b) of the Social Security Amendments of 1972 gave states the option of covering only those aged, blind, and disabled that meet the more restrictive requirements of state cash assistance programs for these groups in place in 1972 rather than the more generous SSI eligibility requirements.[85] About one quarter of the states have adopted this option and are called "209(b) states."[86]

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[79] Medicaid Source Book, *supra* note 28, at 181-83.

[80] *See supra* notes 66-70 and accompanying text.

[81] 42 U.S.C. §§601-616(f) (1988).

[82] *Id.* at §§1381-1383c. Initially, Congress based eligibility on the predecessor programs of SSI, i.e.,, Old Age Assistance, Aid to the Blind and Aid to the Disabled. Social Security Amendments of 1965, Pub. L. No. 89-97 §§1901-1905, 79 Stat. 288, 344-351. In 1972, Congress consolidated these three programs into the federally financed SSI program. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1332, 1465 (1972) (codified as amended at 42 U.S.C. §1381 (1988)).

[83] These eligibility expansions are numerous and have highly technical qualification requirements. The best description of these eligibility expansions and the statutory and regulatory authority on which they are based is contained in 3 Medicare & Medicaid Guide (CCH) ¶¶14,211-14,381 (1990). *See also*Medicaid Source Book, *supra* note 28, at 54-78.

[84] S. Rep. No. 93-553, 56 (1972).

One consequence of predicating Medicaid eligibility on meeting characteristics of two categorical assistance programs is to create two distinct and very different groups of Medicaid beneficiaries. One group, AFDC recipients, are young women and children, predominantly minorities.[87] The other group, SSI recipients, are generally old, severely disabled and, more often, white.[88] These two groups have very different public reputations, constituencies, and political clout. While constituting the smaller percentage of Medicaid eligibles (27.8 percent in 1988), those receiving Medicaid on the basis of SSI eligibility receive the great majority of expenditures (73.2 percent in 1988).[89]

a. Eligibility Groups

A state program must include the so-called "mandatory categorically needy." These are recipients of the AFDC program and, in non209(b) states, the SSI program.[90] Mandatory categorically needy also includes groups of individuals who, for fairly technical reasons, are not eligible for AFDC or SSI but still have incomes at or near the applicable AFDC or SSI levels.[91] States basically set the need standard and payment levels for their AFDC populations and consequently eligibility for AFDC varies widely from state to state.[92]

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[85] Social Security Amendments of 1972, §209(b), 86 Stat. 1381-82 (current version at 42 U.S.C. §1396a(f) (1988)).

[86] The following states are "209(b) states:" Connecticut, Illinois, Indiana, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Utah and Virginia. *See* 3 Medicare and Medicaid Guide (CCH) ¶¶15,550-15,660 (1990).

[87] For Fiscal Year 1987, 36.6 percent of AFDC recipients were white, 1.3 percent native American, 16.2 percent Hispanic, 40.4 percent Black, 3.0 percent Asian, and 2.5 percent unknown. Dep't of Health & Human Svcs., Family Support Admin., Off. of Family Assistance, *Characteristics and Financial Circumstances of AFDC Recipients, 1987* (1987).

[88] Of the 82.1 percent of SSI recipients for whom data were reported, 52.2 percent were white, 24.9 percent were Black, and 5 percent were reported as "other." The categorical breakdown according to eligibility for 100 percent of SSI recipients was 32.5 percent aged, 1.9 percent blind, and 65.6 percent disabled. A person who begins to receive SSI as a blind or disabled person continues to be categorized as such after turning 65. 1988 Soc. Sec. Bull. 74, 75 (Tables Q-17, Q-20).

[89] Medicaid Source Book, *supra* note 28, at 4-5.

[90] *See supra* note 80 and accompanying text.

[91] 42 U.S.C. §§1396a(a)(10), & 1396b(a) (1988); 42 CFR §§435.100-435.136, 436.100-436.124 (1988). *See* Medicaid Source Book, *supra* note 28, at 58-59, 64-66.

[92] Medicaid Source Book, *supra* note 28, at 55-57 & Table II-2.

Since the mid-1980s, Congress has actively sought to equalize Medicaid eligiblity for poor infants, children and mothers and move away from simply basing the eligibility of these groups on AFDC eligiblity which varies widely from state to state.[93] In the Omnibus Budget Reconciliation Act of 1989, Congress continued a five year effort to expand mandatory coverage for infants, children and mothers[94] by requiring that by 1990, states must cover pregnant women and children under age six born after 1983 whose incomes are at or below 133 percent of the federal poverty level.[95] In the Budget Reconciliation Act of 1990, Congress, in an extraordinary step given the desparate search for budget cutting opportunities associated with the passage of that legislation,[96] expanded mandatory coverage further for all children under age 19 and pregnant women to be phased in over several years.[97] This eligibility expansion is a major effort to simplify the program and to treat similarly situated poor in different states in a uniform manner.

States also have the option of covering other groups of individuals, called the "optional categorically needy," who also do not qualify for AFDC or SSI for fairly technical reasons.[98] In general, these groups have slightly higher incomes than applicable SSI or AFDC levels. One example of the optional categorically needy are children under age seven born after 1983 and pregnant women whose incomes are under 185 percent of the federal poverty level.[99] Another key group is institutionalized blind, disabled, or elderly individuals with incomes up to 300 percent of the SSI income eligibility level.[100] In

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[93] *See supra* note 92 and accompanying text.

[94] *See infra* notes 189, 193, 205-206, 213 & 229 and accompanying text.

[95] Omnibus Budget Reconciliation Act of 1989 §6401, Pub. L. No. 101-239, [hereinafter "OBRA '89"], 103 Stat. 2258-59 (codified at 42 U.S.C. §1396a(a)(10) (Law Co-op. 1985 & Supp. 1990).

[96] Hager, *Deficit Deal Ever So Fragile as Hours Dwindle Away*, Cong. Q., Oct. 27, 1990, at 3574.

[97] OBRA '90, §4601-4603, 104 Stat. 1388 (to be codifed at 42 U.S.C. §1396a (a)(10)(A) & 1396a(e)). *See infra* note 239 and accompanying text.

[98] 42 U.S.C. §§1396a(a)(10), 1396b(a) (1988); 42 CFR §§435.200-435.231 & 435.200-435.230 (1988). *See* Medicaid Source Book, *supra* note 28, at 59-61, 66-69.

[99] 42 U.S.C. §1396a(a)(10)(A)(ii) (1988).

States have generally taken advantage of this optional eligibility expansion for children and pregnant women. By Spring 1988, 33 states had accordingly adopted expanded eligibility criteria for these groups. *See* I. Hill, Broadening Medicaid Coverage of Pregnant Women and Children: State Policy Responses (1987); I. Hill, Reaching Women Who Need Prenatal Care: Strategies for Improving State Prenatal Programs (1988).

[100] 42 CFR §§435.721-435.722, 435.1005 (1988).

1986, Congress also gave states the option of covering all elderly and disabled whose incomes were under 100 percent of the federal poverty level.[101]

States are also given the option of covering the "medically needy." These are individuals who, except for their income or resources, meet the other eligibility requirements for SSI or AFDC.[102] To be eligible for federal matching funds, the income of the medically needy person after deduction of medical expenses cannot exceed 133 percent of the state's AFDC standard,[103] except that the gross income of institutionalized medically needy can reach 300 percent of the SSI income level.[104] The medically needy program basically offers catastrophic health and long term care insurance for lower income people who must "spend down" their income and resources to obtain Medicaid eligibility. Seventy percent of states have this type of program.[105] Most of the states without such programs are in the South and Southwest.[106]

b. Income and Resource Determinations

Determining Medicaid eligibility is complex. The chief reason is the detailed and technical income and resource requirements imposed by federal and state law that beneficiaries must meet to become eligible for Medicaid.[107] Income and resource determinations are particularly complicated in 209(b) states which may use eligibility rules of the 1972 categorical assistance programs for the aged, blind, and disabled rather than the simpler eligibility rules for the SSI program.[108] Of all issues affecting beneficiaries, no other has generated the amount of litigation that various income and resource requirements have,[109] including several cases before the Supreme Court.[110]

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[101] *See infra* note 207.

[102] 42 U.S.C. §1396a(10)(C) (1988). *See generally* Nat'l Health Law Prog., An Advocate's Guide to the Medically Needy Program (1985).

[103] 42 U.S.C. §1396a(10)(A), 42 CFR §435.811 (1988).

[104] *Id.* at §§435.721, 435.722, 435.1005.

[105] 3 Medicare & Medicaid Guide (CCH) ¶¶15,550-15,660 (1989).

[106] *See id.*

[107] 42 U.S.C. §1396a(a)(17) (1988).

[108] *See supra* note 83 and accompanying text.

[109] *See e.g.*, Mallow v. Eichler, 860 F.2d 1179 (3d Cir. 1988); Childress v. Bowen, 833 F.2d 231 (10th Cir. 1987); Mitchell v. Lipscomb, 851 F.2d 734 (4th Cir. 1988); Olson v. Norman, 830 F.2d 811 (8th Cir. 1987); Vance v. Hegstrom, 793 F.2d 1018 (9th Cir. 1986); Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985), *cert. denied*, 478 U.S. 1007 (1986); Winter v. Miller, 676 F.2d 276 (7th Cir. 1982); Brown v. Smith, 662 F.2d 464 (7th Cir. 1981); Norman v. St. Clair, 610 F.2d 1228 (5th Cir. 1980), *cert. denied*, 453 U.S. 922 (1984); Mowbray v. Kozlowski, 724 F. Supp. 404 (W.D. Va. 1989).

One of the most complex and controversial aspects of this determination, particularly in 209(b) states, is whether and the extent to which income of one's spouse or the parents of children under 21, blind, or disabled, is "deemed" available to the applicant for purposes of determining Medicaid eligibility.[111] The Medicaid "deeming" rules have been particularly controversial in the case of spouses where one is institutionalized,[112] although Congress liberalized these rules considerably in 1988 even for 209(b) states.[113] There are also strict rules governing the degree to which people can transfer assets to relatives in order to meet Medicaid eligibility requirements.[114]

The Medicaid eligibility determination process is so complex, particularly with respect to documenting income and resources and determining whether applicants have "spent down" their income and resources to qualify for Medicaid, that many beneficiaries do not complete the process of applying for Medicaid benefits. One study of seventeen Southern states found that, in fiscal

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[110] *See, e.g.*, Atkins v. Rivera, 477 U.S. 154 (1986); Herweg v. Ray, 455 U.S. 265 (1982); Schweiker v. Hogan, 457 U.S. 569 (1982); Schweiker v. Gray Panthers, 453 U.S. 34 (1981).

[111] 42 U.S.C. §1396a(a)(17) (1988).

In *Gray Panthers*, 453 U.S. at 34, the Supreme Court upheld federal regulations pertaining to deeming of income in 209(b) states. The Court stated that, because of the intricacies of the Medicaid statute, Congress intended that the Secretary have broad authority to promulgate implementing regulations. *See Herweg*, 455 U.S. at 265 (upholding regulation regarding deeming of income in states using SSI standards). *See infra* notes 272-74 and accompanying text.

[112] *See* Medicaid Source Book, *supra* note 28, at 79-84. *See also* Mitchell, *Spousal Impoverishment: Medicaid Burdens on the At-Home Spouse of a Nursing Home Resident*, 20 Clearinghouse Rev. 358 (1986); Drizner, *Medicaid's Unhealthy Side Effect: The Financial Burdens on At-Home Spouses of Institutionalized Recipients*, 18 Loy. U. Chi. L. J. 1031 (1987).

[113] MCCA '88 §303(a)(1) (codified at 42 U.S.C. §13961-5 (1988)). *See* Medicaid Source Book, *supra* note 28, at 84-86.

[114] 42 U.S.C. §§1396(a)(18), 1396p (1988). *See* Herron, *Medicaid Eligibility and Transfer of Assets: Randall v. Lukhard*, 4 DET. C.I., REV. 997 (1984); Deford, *Medicaid Liens, Recoveries, and Transfer of Assets After TEFRA*, 18 CLEARINGHOUSE REV. 134 (1984).

Since 1983, HCFA permits states to make adult family members financially responsible for family members on Medicaid if the state has a family responsibility statute of general applicability. HEALTH CARE FIN. ADMIN., STATE MEDICAID MANUAL §3812, (1982). The Medicaid statute prohibits states from taking into account the financial responsibility of anyone but spouses or parents. 42 U.S.C. §1396a(a)(17)(D) (1988). Nevertheless, HCFA takes the view that, if states have a statute requiring such financial support for all welfare programs, states can apply that statute to their Medicaid programs. *See*, Whitman & Whitney, *Are Children Legally Responsible for the Support of the Parents? The 1983 Medical Eligibility Transmittal Harms the People Involved and Should be Withdrawn*. 123 TR. & EST. 43 (1984); Patrick, *Honor Thy Father and Mother Paying the Medical Bills of Elderly Parents*. 19 U. RICH. L. REV. 69 (1984).

year 1985-1986, 63 percent of all applications by mothers with children were denied due to the applicant's "failure to comply with procedural requirements."[115] This study also found that the number of applications denied on this ground increased 75.2 percent between 1980 and 1986.[116] This is an extremely disturbing finding, for it suggests that complex application procedures discourage potentially eligible applicants from even completing the application process. Elderly and disabled beneficiaries have comparable problems, as evidenced by startling testimony in a recent congressional hearing recounting the experiences of elderly Medicaid applicants in one 209(b) state[117] who ultimately did not qualify for Medicaid because of extensive reporting and verification requirements regarding income and resources.

It would be appropriate for Congress, HCFA, and the states to devise ways to simplify the eligibility determination process. It does appear that the complexity of Medicaid eligibility law, rules, and policy at the federal and state level is having a serious impact on the administration of eligibility determinations to the detriment of the most destitute and unsophisticated persons in our society.

2. Benefits and Coverage

a. Benefits

The federal Medicaid statute specifies the benefits that state programs must cover to qualify for federal matching funds and identifies specific additional benefits that states have the option of covering.[118] States must cover the following benefits to the mandatory categorically needy and, if the state program includes them, the optional categorically needy: inpatient hospital services, laboratory, x-ray and physician services, early and periodic screening diagnosis and treatment (EPSDT) services for children, family planning services and supplies, nurse midwife services, and nursing facility and home health services for individuals 21 and older.[119] States may cover dental services, physical therapy and related services, home health and preventive services, drugs, eye glasses, and nursing home services.

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[115] S. Shuptrine & V. Grant, Study of the AFDC/Medicaid Eligibility Process in the Southern States for the Southern Regional Project on Infant Mortality 1 (So. Governor's Ass'n & So. Legislative Conf., 1988). *See* Colburn, *Bureaucratic Barriers to Medicaid Benefits*, Wash. Post Health, June 21, 1988, at Z7.

[116] S. Shuptrine & V. Grant, *supra* note 109, at 9.

[117] *Public/Private Partnerships: Innovative Approaches to Long term Care: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 88-109 (1990) (Testimony of Scott R. Severns, Esq.).

[118] 42 U.S.C. §1396d(a)(1)-(17) (1988).

[119] 42 CFR §440.210 (1988). *See* Medicaid Source Book, *supra* note 28,

The mandatory benefit of skill nursing home care and intermediate care is a crucial and widely used Medicaid benefit for the elderly and disabled as well as the mentally retarded. In 1986, as noted above, Medicaid paid 41 percent of all nursing home expenditures.[120] In addition, 30 percent of all Medicaid disbursements were for nursing home care in 1986.[121]

States have greater flexibility in structuring the benefit package for their medically needy programs. However, any medically needy program must include prenatal and delivery care for pregnant women, ambulatory health care services and home health care for individuals entitled to skilled nursing home services.[122]

b. Coverage Policy

Coverage of services must be "sufficient in amount, duration and scope to reasonably achieve their purpose."[123] States may limit coverage to medically necessary services[124] and may even impose fixed limits on the amount of a particular type of covered service, such as hospital days or physician visits.[125] To assure that states do not unduly favor one group of Medicaid eligibles over another, there are limits on the degree to which states can provide coverage of benefits for some groups of Medicaid eligibles and not for others.[126] In addition, states cannot arbitrarily discriminate in benefit coverage for

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at 93-96.

[120] *See supra* note 28 and accompanying text.

[121] Medicaid Source Book, *supra* note 28, at 33.

[122] 42 CFR §440.220 (1989).

[123] *Id.* at §440.170 (1988).

[124] 42 U.S.C. § 396a(a)(10) (1988); 42 CFR Pt. 410 (1988).

[125] *See* Curtis v. Taylor, 625 F.2d 645 (5th Cir. 1980) (upholding Florida's limit on number of physician visits). *See* cases cited *infra* in note 144 (cases brought by hospitals and nursing homes to challenge limits on inpatient days). Also, in *Alexander v. Choates*, 469 U.S. 287 (1985), the Supreme Court ruled that a state's limitation on coverage of inpatient hospital days did not violate §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1988).

[126] Specifically, coverage for all groups of categorically needy must be equal in amount, duration, and scope and at least equivalent to coverage for the medically needy. 42 U.S.C. §1396a(a)(10)(B) (1988); 42 CFR §440.240 (1988). Similarly, coverage of services within each group of medically needy must also be equal in amount, duration, and scope except where otherwise authorized by regulation. 42 U.S.C. §1396a(a)(10)(B) (1988); 42 CFR §440.240 (1988). Coverage of services provided by health maintenance organizations (HMOs) must be of comparable amount, duration, and scope as nonHMO services. 42 U.S.C. §1396b(m)(1)(A)(i) (1988).

mandatory services on the basis of diagnosis, type of illness or condition.[127] States do not have to cover organ transplants, but they must submit a state plan amendment outlining the criteria for coverage to HCFA if they do.[128] As a result of these flexible rules, there is considerable variation among states as to coverage of both mandated and optional Medicaid benefits.[129]

C. Payment of Providers

States also have considerable flexibility in setting the level and method for paying providers of services. In 1987, 42 states had prospective payment systems for inpatient hospital care and all but four states used such systems for nursing home care.[130] Three states, California, Illinois and Vermont, have a waiver of Medicaid program requirements to negotiate rates directly with particular hospitals through selective contracting systems.[131] The majority of states use fee schedules to base physician payment.[132] For hospital outpatient departments, most states use either fee schedules or some type of cost reimbursement scheme.[133]

There are federal requirements for state payment methodologies many of which have proven controversial in their implementation.[134] First, only providers who accept Medicaid reimbursement as payment in full can participate in the Medicaid Program.[135] However, states may also impose nominal co-payments on beneficiaries for some services.[136] State payment rates must be consistent with efficiency, economy and quality of care.[137] At least annually, states must make findings that their payment rates for hospitals and nursing homes meet federal requirements and also do not exceed Medicare payment rates.[138]

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[127] *Id.* at §1396a(a)(1)-(5); 42 CFR Pt. 411 (1988). *See, e.g.,* Pinneke v. Presser, 623 F.2d 546 (8th Cir. 1980); Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich. 1986); Weaver v. Reagan, 701 F. Supp. 717 (W.D. Mo. 1988). In *Weaver v. Reagan*, a federal district court ruled that Missouri could not limit Medicaid coverage for the drug AZT within federal guidelines published by the Food and Drug Administration for treatment of AIDS victims, as federal Medicaid regulations required coverage of medically necessary treatments as determined by the patient's physician. *See generally* Buchanon, *State Medical Coverage of AZT and AIDS-Related Policies*, 7 Am. J. Pub. Health 432 (1988).

[128] 42 U.S.C. §1396b(i) (1988). *See* Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988); Todd v. Sorrell, 841 F.2d 87 (4th Cir. 1988).

[129] *See* Medicaid Source Book, *supra* note 28, at 91-114; K. Erdman & S. Wolfe, *supra* note 16.

[130] Medicaid Source Book, *supra* note 28, at 125, 131.

[131] *Id.* at 128.

[132] *Id.* at 135-37.

[133] *Id.* at 137-38.

[134] 42 U.S.C. §1396a(a)(2) & (30)(A) (1988); 42 CFR Pt. 447 (1988). *See* Medicaid Source Book, *supra* note 28, at 124-48.

[135] 42 CFR §447.15 (1988).

Payment levels must also be sufficient to ensure that there are enough providers to serve Medicaid beneficiaries.[139] This requirement has been especially difficult for states to meet with respect to physician services.[140] State payment rates for physicians have consistently been so low that access to health care services among many groups, particularly pregnant women and children, has been compromised.[141] Medicaid payment methodologies have also decreased hospital participation in Medicaid, particularly since 1981.[142]

Medicaid rates for hospitals and skilled nursing facilities cannot exceed Medicare rates, but must be "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities."[143] This requirement has

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[136] 42 U.S.C. §1396o (1988). *See* Kinney, *Medicaid Copayments: A Bitter Pill for the Poor*, 10 J. Legis. 213 (1983).

[137] 42 CFR §447.200 (1988).

[138] *Id.* at §447.253(1).

[139] *Id.* at §447.204.

[140] *See, e.g.*, Fossett & Peterson, *Physician Supply and Medicaid Participation: The Causes of Market Failure*, 27 Med. Care 386 (1989); Perloff, Kletke & Neckerman, *Physicians' Decisions to Limit Medicaid Participation: Determinants and Policy Implications*, 12 J. Health Pol., Pol'y & L. 221 (1987); Perloff, Kletke & Neckerman, *Recent Trends in Pediatrician Participation in Medicaid*, 24 Med. Care 749 (1986); Garner, *Increasing Clients' Access to Medicaid Providers: New Developments*, 18 Clearinghouse Rev. 1269 (1985); Mauskopf, Rodgers & Dobson, *State Medicaid Program Controls and Health Care Services Utilization*, 7 Health Care Fin. Rev. 16 (1985); Holahan, *Paying for Physician Services in State Medicaid Programs*, 5 Health Care Fin. Rev. 99 (1984).

[141] *See* D. Lewis-Idema, Increasing Provider Participation (Nat'l Governors Ass'n 1988).

[142] *See* J. Holahan, The Impact of Alternative Medicaid Hospital Payment Systems on Hospital's Medicaid Revenues, Administrations, and Lengths of Stay (1987); Holahan, *The Impact of Alternative Hospital Payment Systems on Medicaid Costs*, 25 Inquiry 517 (1988); Mauskopf, Rodgers & Dobson, *supra* note 140.

Indeed, the American Hospital Association reported that Medicaid admissions accounted for 60 percent of the 1.6 percent drop in hospital admissions for all persons under age 65 from 1981 and 1982, a significant statistic since Medicaid accounted for only 10.5 percent of all hospital admissions for this age group during this period. Am. Hosp. Ass'n, Off. of Pub. Policy Analysis, Reasons for the Downturn in Under 65 Admissions (Policy Brief No. 52, 1984).

[143] 42 U.S.C. §1396a(a)(13)(A) (1988).

In the 1980s, Congress revised federal requirements for state payment methodologies for institutional providers, enabling states to depart from cost reimbursement to more innovative and presumably cost saving payment methodologies based on the criterion that payment rates be proven controversial, particularly in the early 1980s when states tightened payment rates as evidenced by the litigation of hospitals, nursing homes, and their associations.[144] Reiterating that Congress has endeavored to place the responsibility on states to determine whether state Medicaid payment methodologies for institutional providers met these criteria, the Supreme Court in Virginia Hospital Association v. Wilder[145] ruled that the "Boron Amendment" authorizing states to adopt "reasonable and adequate" payment rates created a substantial federal right inuring to the benefit of providers and thus was enforceable under 42 U.S.C. §1983 which authorizes a private cause of action for the "deprivation of any rights" secured by federal laws.[146] State payment rates must meet the special needs of institutions serving a disproportionate share of the poor,[147] another requirement that has proven extremely controversial, particularly in recent years.[148] This requirement was initially enacted in the Omnibus Budget Reconciliation Act of 1981[149] but was

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"reasonable and adequate" to meet the costs of "efficiently and economically operated facilities." *Id.* In the "Boron Amendment" of the Omnibus Reconciliation Act of 1980, §962(b), Pub. L. No. 96-499, 94 Stat. 2651, Congress established this standard for nursing homes. The following year, Congress extended this requirement for hospitals. OBRA '81 §2173, 95 Stat. 357, 808-09 (1981).

[144] *See* Kennedy, *The Medicaid Program: Vague Standards Breed Litigation*, 28 St. Louis U. L. J. 351 (1984); Kinney, Hospital Challenges to State Medicaid Payment Rates Since the Omnibus Budget Reconciliation Act of 1981 (Am. Hosp. Ass'n, 1984). *See, e.g.*, Temple Univ. v. White, 429 F. Supp. 1093 (E.D. Pa. 1990). Washington St. Hosp. Ass'n v. Washington, [1987-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶36,352 (W.D. Wash. May 18, 1987); Wisconsin Hosp. Ass'n v. Reivitz, 820 F.2d 863 (7th Cir. 1987); Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653 (4th Cir. 1989), *aff'd sub nom.*, Virginia Hosp. Ass'n v. Wilder, 110 S. Ct. 2510 (1990); West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11 (3rd Cir. 1989); Friedman v. Perales, 668 F. Supp. 216 (S.D.N.Y. 1989), *aff'd*, 841 F.2d 47 (2d Cir. 1988); Colorado Health Care Ass'n v. Colorado Dep't of Social Services, 598 F. Supp. 1400 (D. Colo. 1984), *aff'd*, 842 F.2d 1158 (10th Cir. 1988); Hillhaven Corp. v. Wisconsin Dept. of Health and Social Services, 634 F. Supp. 1313 (E.D. Wisc. 1986); Illinois Health Care Ass'n, Inc. v. Quern, [1983-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶32,396 (N.D. Ill. 1983); Nebraska Health Care Ass'n, Inc. v. Dunning, 575 F. Supp. 176 (D. Neb. 1983).

[145] 110 S. Ct. 2510 (1990), *aff'g sub nom.*, Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653 (4th Cir. 1989).

[146] 42 U.S.C. §1983 (1988).

[147] 42 U.S.C. §§1396a(a)(13)(A), 1396a(h), & 1396r-4 (1988)); 42 CFR §447.253(b)(1)(ii)(A) (1988).

[148] *See infra* notes 298-306 and accompanying text.

[149] OBRA '81 §2161 (current version at 42 U.S.C. §§1396a(a)(18)(A), 1396a(h) & 1396r-4 (1988).

never fully or effectively implemented.[150] Then, in the Omnibus Budget Reconciliation Act of 1987, Congress established minimum criteria for disproportionate share hospitals, required states to make payment adjustments to these hospitals, and also prohibited HCFA from limiting the amount of these payment adjustments.[151]

States can contract with HMOs to provide Medicaid services for a prepaid, set premium for each enrollee but at levels that assure accessible services.[152] Since passage of the Omnibus Budget Reconciliation Act of 1981, which contained several provisions facilitating the use of HMOs and other managed care systems for Medicaid beneficiaries,[153] states have experimented extensively with serving their Medicaid populations through HMOs and other prepaid, case management approaches.[154] In the early 1980s, HCFA conducted an extensive evaluation of these initiatives.[155] It is noteworthy that there has been considerable concern about the ability of states to transfer risk and responsibility for the treatment of Medicaid beneficiaries to HMOs and other private organizations sponsoring case management programs and the resulting lack of public control over the quantity and quality of services provided to Medicaid beneficiaries in these systems.[156]

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[150] D. Lipson, Revised State Medicaid Policies for Disproportionate Share Hospitals: A Status Report (Nat'l Ass'n of Pub. Hosp., 1989).

[151] Omnibus Budget Reconciliation Act of 1987, §4112, Pub. L. No. 100 - 203, [hereinafter "OBRA '87"], 101 Stat. 1330-148 to 1330-150 (codified at 42 U.S.C. §1396a(h) (1988)).

[152] 42 U.S.C. §1396b(m) (1988); 42 CFR §417.104-417.105 (1988).

[153] OBRA '81 §2178, 95 Stat. 357, 813-15 (current version at 42 U.S.C. §1396n(a)(1)(A) (1988)).

[154] Iglehart, *Medicaid Turns to Prepaid Managed Care*, 308 New Eng. J. Med. 976 (1983); Dallek, Parks & Waxman, *Medicaid Primary Care Case Management Systems; What We've Learned*, 18 Clearinghouse Rev. 270 (1984); Nat'l Governors Ass'n, Prepaid and Managed Care under Medicaid: Overview of Current Initiatives (1985); E. Neuschler, Prepaid Managed Care under Medicaid: Overview of Current Initiatives (1985); Freund & Neuschler, *Overview of Medicaid Capitation and Case-Management Initiatives*, Health Care Fin. Rev. 21 (1986 Annual Supp.); Anderson & Fox, *Lessons Learned From Medicaid Managed Care Approaches*, 6 Health Aff. 71 (1987); Laudicina & Burwell, *A Profile of Medicaid Home and Community-Based Care Waivers, 1985: Findings of a National Survey*, 13 J. Health Pol., Pol'y & L. 525 (1988).

[155] *See* Health Care Fin. Admin., Nationwide Evaluation of Medicaid Competition Demonstration (1986); D. Freund, P. Ehrenhaft & M. Hackbarth, Medicaid Reform: Four Studies of Case Management (1984).

[156] *See, e.g.*, Bovbjerg, Held & Pauly, *Privatization and Bidding in the Health-Care Sector*, 6 J. Pol'y Analysis and Management 648 (1987); Rosenblatt, *Medicaid Primary Care Case Management, The Doctor-Patient Relationship, and the Politics of Privatization*, 36 Case Wes. Res. L. Rev. 915 (1985-86); Freund, *The Private Delivery of Medicaid Services: Lessons for Administrators, Providers, and Policymakers*, 9 J. Ambulatory Care Mgmt. 54 (1986).

D. Waiver of Program Requirements

Waivers play an important role in the Medicaid program by permitting states to experiment with different approaches to financing and delivering health care services and also to meet the particular needs of special groups of beneficiaries. The most important waiver authorities are for primary care case management systems[157] and home and community based long term care.[158] In primary care case management systems, states contract with certain providers and require beneficiaries to get only services provided or authorized by these providers and mandate case management for the care of individual beneficiaries.[159] With the home and community based long term care waivers, states can provide home and community-based long term care services to individuals who would otherwise require care in a skilled nursing facility or an intermediate care facility.[160] Also, under this waiver authority, states can obtain Medicaid funding for some social services that would not otherwise be covered under the Medicaid program.[161] Nevertheless, expenditures for services at home cannot exceed those that would have been incurred in an institution.[162] In the Tax Equity and Fiscal Responsibility Act of 1982, Congress authorized another waiver authority which gives states the option of extending Medicaid eligibility to disabled children living at home who would qualify for SSI if institutionalized.[163] This waiver was expanded in 1985 to include all ventilator dependent children who would qualify for SSI and Medicaid if institutionalized but would lose Medicaid eligibility if treated at home because of the deeming of their parents' income to them.[164] Under these authorities, states may waive the deeming rules and pay for support services to keep the children in the home, at costs lower than would be incurred if the child was institutionalized.

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[157] 42 U.S.C. §1396n(b)(1) (1988).

[158] 42 U.S.C. §1396n(c) (1988).

[159] *See* Senate Comm. on Finance, 98th Cong., 2d Sess., New Approaches to Providing Health Care to the Poor: Medicaid Freedom of Choice Waiver Activities (Comm. Print 1984).

[160] Medicaid Source Book, *supra* note 28, at 156-159.

[161] *Id.* at 157.

[162] 42 U.S.C. §1396n(c)(2)(D) (1988) (for the mentally retarded) and 42 U.S.C. §1396n(d)(5) (1988) (for the elderly).

[163] Tax Equity and Fiscal Responsibility Act of 1982, §134, Pub. L. No. 97-248 [hereinafter "TEFRA"], 96 Stat. 324, 375 (current version at 42 U.S.C. §1396a(a)(2)(B) & (C) (1988)).

These waiver authorities for seriously ill children were inspired by the highly publicized case of a ventilator dependent child, Katie Beckett. Katie spent the first three years of her life in an institution because her family could not afford to treat her at home. President Ronald Reagan intervened at the beginning of his administration to obtain Medicaid eligibility for her. *See* Connell, *HHS Waives Rules So Katie Can Have Medicaid at Home*, Wash. Post, Nov. 13, 1981, at A20, *Girl to be Treated at Home*, N. Y. Times, Nov. 13, 1981, at A12, col. 5.

HCFA has also established a separate category of so-called "model waivers" to address the needs of individual children who might qualify for Medicaid only if institutionalized.[165] States must keep the number of persons served under a model waiver relatively small; otherwise the state must use the waiver authority enacted in TEFRA for children who would be eligible for Medicaid only if institutionalized and would have to include all such children in the state.[166]

These waivers essentially expand Medicaid eligibility to some catastrophically-ill children of middle class parents. The model waivers are particularly troublesome because they are triggered primarily by the application of parents. They greatly depend on the parents' ability to bring political pressure on state agencies and HCFA to secure Medicaid eligibility for their child. Model waivers, by definition, are not accorded to every child in need in the state. These waiver authorities have not been used extensively since 1981.

E. Appeal Procedures

A state Medicaid plan must provide for "granting an opportunity for fair hearing before the [s]tate agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness."[167] Federal Medicaid regulations establish procedures for hearings involving the suspension, termination, or reduction of services. Specifically, the state plan may provide a hearing before the state agency or an evidentiary hearing at the local level with the right to appeal to the state agency.[168] Federal law also mandates specific appeal procedures for nursing home beneficiaries dissatisfied with their care or treatment in long term care facilities[169] and for disputes over income and resource determinations regarding eligibility for long term care services.[170] Federal Medicaid regulations require that states provide appeal or exception procedures for providers to obtain administrative review of state Medicaid payment rates.[171]

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[164] Consolidated Budget Reconciliation Act of 1985, §9502, Pub. L. No. 99-272, [hereinafter "COBRA"], 100 Stat. 82, 202 (current version at 42 U.S.C. §1396a(e)(3)(C) (1988)).

[165] Medicaid Source Book, *supra* note 28, at 159.

[166] *Id.*

[167] 42 U.S.C. §1396a(a)(3) (1988); 42 CFR §431.205 (1988).

[168] *Id.* at §431.205.

Further, when a state agency takes any action affecting an individual's claim for Medicaid benefits, the state agency must give notice and include reasons for the action and an explanation of the applicable law and regulations as well as the procedures to be invoked in the hearing.[172] Several cases have addressed notice issues and, indeed, notice seems to be the predominant issue regarding procedural due process raised in litigation since 1981.[173]

IV. Medicaid Rule and Policy Making

Since 1981, problems have developed with Medicaid rule and policy making at the federal level and implementation of these policies at the state level. It is fair to say that the large number of congressionally-mandated changes in the Medicaid program since 1981, as well as program changes initiated by HCFA, have precipitated many of these problems. This section reviews these changes and HCFA's rule and policy making activities; it then specifically analyzes the problems with HCFA rule and policy making for the Medicaid program.

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[169] 42 U.S.C. §1396r(c)(1)(A)(vi) (1988).

[170] 42 U.S.C. §1396r(e)(7)(F) (1988).

[171] 42 CFR §447.253(c) (1988).

[172] *Id.* at §§431.206 & 431.210.

[173] In *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1986), the Third Circuit ruled that procedural due process required that the notice of termination to a Medicaid beneficiary must contain the specific calculations used to arrive at the decision to terminate benefits and that the state agency could not rely on adverse statements from declarants who were not available for cross-examination or confrontation at the termination hearings. In *Easley v. Arkansas Dep't of Human Services*, 645 F. Supp. 1535 (E.D. Ark. 1986), a federal district court ruled that a Medicaid handbook with a toll free telephone number given to Medicaid beneficiaries upon entry into the Medicaid program was insufficient notice of a requirement that the state must authorize payment for medical services before they are obtained.

A. Congressionally-Mandated Changes in the Medicaid Program

In 1981, Congress, following an initiative from the new, popular, and ideologically conservative Reagan administration, enacted fundamental changes in the Medicaid program. Basically, the Omnibus Budget Reconciliation Act of 1981 ("OBRA '81") limited the federal financial commitment to the Medicaid program while according states greater flexibility to structure their Medicaid programs to achieve savings.[174] Specifically, OBRA '81 reduced federal Medicaid payments to states by 3 percent in fiscal year 1982, and provided for further reductions in later years which Congress subsequently repealed.[175] OBRA '81 accorded states greater flexibility in setting eligibility and coverage policy,[176] methods for paying hospitals,[177] and requirements for HMOs serving Medicaid recipients.[178] In addition, Congress gave HCFA authority to grant waivers of program requirements to establish case management systems and home and community-based care for some Medicaid beneficiaries.[179] As a result of this new flexibility, the 1980s witnessed great changes in state Medicaid programs including the adoption of innovative reforms in the way health care services are delivered to the Medicaid population.[180]

In subsequent years, Congress enacted many more changes in the Medicaid program as part of its effort to reduce the federal budget deficit. The federal budget deficit reached a startling $110.6 billion in fiscal year 1982, the year following passage of the cost containment measures of OBRA '81.[181] The Medicaid program became an extremely attractive target for budget cutting. For many other parts of the federal budget, e.g., defense and Social Security income insurance programs (which comprise nearly half of budgetary expenditures),[182] and interest on the national debt, were unavailable for reductions either as a political or practical matter.

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[174] OBRA '81 §§2171-2174, 95 Stat. 357, 807-809 (codified at scattered sections of §§1396--1396s (1988)). *See* R. Bovbjerg & J. Holahan, Medicaid in the Reagan Era: Federal Policy and State Choices (1982); J. Holahan, The Effects of the 1981 Omnibus Reconciliation Act on Medicaid (1985); Wing, *The Impact of Reagan-Era Politics on the Federal Medicaid Program*, 33 Cath. U.L. Rev. 1 (1983), Rowland, Lyons & Edwards, *supra* note 35.

[175] OBRA '81 §2161, 95 Stat. 357, 803-805 (codified at 42 U.S.C. §1396b (1988)), *repealed*, Pub. L. No. 97-248, §137(a)(2) (1982).

[176] OBRA '81 §§2171-72, 95 Stat. 357, 807-808 (current version at 42 U.S.C. §§1396a(a)(10) & 1396a(b) (1988)). *See generally* I. Hill, Medicaid Eligibility: A Descriptive Report of OBRA, TEFRA, and DEFRA Provisions and State Responses (Nat'l Governors Ass'n, 1984).

[177] OBRA '81 §2173, 95 Stat. 357, 808-809 (current version at 42 U.S.C. §1396a(a)(13) (1988)). *See supra* note 143 and accompanying text.

[178] OBRA '81 §2178, 95 Stat. 357, 813-15 (current version at 42 U.S.C. §1396a(e)(2) (1988)).

[179] OBRA '81 §2176, 95 Stat. 357, 812-13 (current version at 42 U.S.C. §1396n(c) (1988)). *See supra* notes 157-63 and accompanying text.

[180] *See* Omenn, *Lessons from a Fourteen-State Study of Medicaid*, 6 Health Aff. 118 (1987). *See supra* notes 153-56 and accompanying text.

In the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), picking up on initiatives of the Reagan Administration,[183] Congress enacted more changes in the Medicaid program. TEFRA expanded state authority to charge co-payments to Medicaid beneficiaries,[184] impose liens on the homes of institutionalized beneficiaries, and levy penalties for transferring homes for less than fair market value before applying for Medicaid benefits.[185] Congress also established optional coverage of home care for disabled children who would qualify for Medicaid only if institutionalized.[186] Finally, the other major change in TEFRA was a six month moratorium on HCFA's efforts to promulgate rules to deregulate nursing homes,[187] a very controversial initiative of the Reagan administration discussed below.[188]

In the mid-1980s, Congress became especially active in mandating changes in the Medicaid program. The Democrats acquired more congressional representatives in the 1982 and 1984 general elections, and gained control of the Senate in the 1986 election. The Democratic Party had a markedly different vision of the federal government's obligation to the poor compared to the Republican administration in power. The tenor of congressional legislation changed from pushing financial and programmatic responsibility to the states and containing federal costs to expanding program benefits with a view toward equalizing treatment of similarly-situated groups across states and imposing greater regulatory authority over providers. The Reagan administration opposed many of these benefit expansions, in part, because of their negative impact on the federal budget.

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[181] Executive Off. of the President, Off. of Management and Budget, Budget of the United States Government, Fiscal Year 1984 M-11 (1983).

[182] These two categories comprised 47 percent of estimated budget outlays in fiscal years in 1989. Budget of the United States Government, Fiscal Year 1984, M-11 (1982).

[183] Executive Off. of the President, Off. of Management and Budget, Budget of the United States Government, Fiscal Year 1983 5-131 (1982).

[184] TEFRA §131, 96 Stat. 324, 367-370 (current version at 42 U.S.C. §§1396a(a)(14) & 1396o (1988)). *See supra* note 136 and accompanying text.

[185] TEFRA §132, 96 Stat. 324, 370-373 (current version at 42 U.S.C. §1396a(a)(18) & 1396p (1988)).

[186] TEFRA §134, 96 Stat. 324, 375 (current version at 42 U.S.C. §1396a(e)(3) (1988)). *See supra* note 163 and accompanying text.

[187] TEFRA §135, 96 Stat. 324, 375.

[188] *See infra* notes 190, 232-34 and accompanying text.

Specifically, in the Deficit Reduction Act of 1984 ("DEFRA"), Congress enacted optional coverage of some pregnant women and children not receiving Medicaid as categorically needy beneficiaries and mandated coverage for all children meeting AFDC income and resource requirements regardless of whether they were receiving AFDC.[189] The impetus for this program expansion was disturbing evidence that the infant mortality rate was not declining, especially for black infants.[190] Interestingly, Congress made this expansion effective regardless of whether HCFA had promulgated implementing regulations, beginning a practice that has accompanied congressionally-mandated changes in the Medicaid program ever since.[191] DEFRA also required that states engage in medical review of services provided to Medicaid beneficiaries to ensure that services provided were medically necessary.[192]

In the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), Congress continued the expansion of optional coverage of pregnant women and children initiated in DEFRA.[193] COBRA established optional hospice benefits,[194] case management services,[195] and expanded coverage of ventilator dependent children who would qualify for Medicaid only if institutionalized.[196] In addition, COBRA required HCFA to promulgate regulations and other requirements for intermediate care facilities for the mentally retarded,[197] and tightened requirements for HMOs and similar organizations serving Medicaid beneficiaries.[198] COBRA also required that, if a state elects to cover organ transplants, it must develop written coverage criteria and standards.[199]

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[189] Deficit Reduction Act of 1984, §2361, Pub. L. No. 98-369 [hereinafter "DEFRA"], 98 Stat. 494, 1104 (current version at 42 U.S.C. §1396a(a)(10)(A) (1988)).

[190] *See supra* note 36 and accompanying text.

[191] DEFRA §2361(d)(1), 98 Stat. 494, 1104.

[192] DEFRA §2368, 98 Stat. 494, 1109-1110 (current version at 42 U.S.C. §1396a(a)(26) & 1396a(a)(31) (1988)).

[193] COBRA §9501, 100 Stat. 82, 201-202 (current version at 42 U.S.C. §§1396a(a)(10)(D) & (e) (1988)).

[194] COBRA §9505, 100 Stat. 82, 208-209 (current version at 42 U.S.C. §§1396a(a)(10) & (13) & 1396d(a) (1988)).

[195] COBRA §9508, 100 Stat. 82, 210-211 (current version at 42 U.S.C. §1396n(g) (1988)).

[196] COBRA §9510, 100 Stat. 82, 212 (current version at 42 U.S.C. §1396a(a)(10) (1988)).

[197] *Id.* at §9514, 100 Stat. 82, 213 (1986).

[198] *Id.* at §9517, 100 Stat. 82, 215-16 (current version at 42 U.S.C. §1396b(m)(2) (1988)).

[199] COBRA §9507(a), 100 Stat. 82, 210 (current version at 42 U.S.C. §1396b(i).

Congress mandated that many of the benefit expansions in COBRA be effective immediately and that states implement many changes whether or not HCFA had promulgated implementing regulations. For example, states had to implement the expanded benefits for children and pregnant women regardless of whether HCFA implemented regulations.[200] (It was two years before HCFA promulgated final rules on this subject.)[201] Congress also specifically required that HCFA promulgate regulations revising standards for the intermediate care facilities for the mentally retarded within sixty days of enactment.[202] Again, HCFA issued these regulations more than two years later.[203]

The following year, Congress again enacted major changes to the Medicaid program in the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86").[204] Congress further expanded optional coverage for poor pregnant women, children and infants,[205] including an optional presumptive eligibility period for pregnant women.[206]

OBRA '86 authorized states, at their option, to make all Medicaid benefits available to the elderly and disabled with incomes up to 100 percent of the federal poverty level and meeting SSI or, if more generous, state resource standards.[207] OBRA '86 also authorized states to pay Medicare cost-sharing expenses for poor Medicare beneficiaries.[208] OBRA '86 modified the

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[200] COBRA §9501(d)(1), 100 Stat. 82, 202.

[201] 42 CFR §§435.115, 435.301, 436.2, 436.114, 436.301 (1988). *See infra* notes 251-53 and accompanying text.

[202] COBRA §9514, 100 Stat. 82, 213.

[203] Health Care Fin. Admin., Conditions for Intermediate Care Facilities for the Mentally Retarded, 53 Fed. Reg. 20,448 (June 3, 1988) (codified at 42 CFR Pts. 431, 435, 440, 442 and 483); Standards for Intermediate Care Facilities/Mentally Retarded, 51 Fed. Reg. 7520 (Mar. 4, 1986).

[204] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 [hereinafter "OBRA '86"], 100 Stat. 1874 (current version at scattered sections of 42 U.S.C.S. (Law. Co-op. 1985 and Supp. 1990)).

[205] OBRA '86 §9401, 100 Stat. 1874, 2050-52 (current version at 42 U.S.C.S. §§1396a(a)(10)(A)(ii)(IX) & 1986a(L) (Law. Co-op. 1985 & Supp. 1990)).

[206] OBRA '86 §9407, 100 Stat. 1874, 2058-60 (current version at 42 U.S.C. §§1396a(a)(47) & 1396r-1 (1988)).

[207] OBRA '86 §9402, 100 Stat. 1874, 2052-53 (current version at 42 U.S.C. §1396a(m) (1988)).

[208] OBRA '86 §9403, 100 Stat. 1874, 2053-56 (current version at 42 U.S.C.S. §§1396a(a)(10)(E) (Law. Co-op. 1985 & Supp. 1990) & 42 U.S.C. §1396d(p) (1988)).

Medicaid waiver authorities[209] and adopted several other measures to enhance the quality and efficiency of the state Medicaid programs.[210]

Again, Congress mandated implementation of most provisions of OBRA '86 either immediately or within fiscal year 1987. Congress also mandated implementation of benefit expansions and some other changes without regard to whether HCFA had promulgated regulations to implement the provision.[211] Further, Congress amended the statutory language regarding effective dates for program expansions in COBRA to facilitate implementation of these expansions.[212]

In the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"), Congress expanded optional coverage for infants, children and mothers and enacted extensive reforms for nursing homes that participated in the Medicare and Medicaid programs.[213] These reforms followed publication of a major study of the quality of care in nursing homes by the prestigous Institute of Medicine.[214] HCFA had asked the Institute of Medicine to conduct this study after a firestorm of protest in Congress and among beneficiary advocates over HCFA's 1982 proposed rule to change procedures for monitoring nursing home compliance with Medicare and Medicaid conditions of participation.[215]

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[209] OBRA '86 §9411, 100 Stat. 1874, 2061-62 (current version at 42 U.S.C. §1396n(c) (1988)).

[210] OBRA '86 §§9431-9436, 100 Stat. 1874, 2066-71 (codified as amended at scattered sections of 42 U.S.C. §§1396-1396s (1988)).

[211] OBRA '86 §9401(f), 100 Stat. 1874, 2052 (optional benefit for pregnant women, infants and children); *Id.* at §9402(c), 100 Stat. 1874, 2052-53 (optional coverage of all Medicaid benefits for elderly and disabled poor); *Id.* at §9403(h), 100 Stat. 1874, 2056 (optional coverage of Medicare cost-sharing expenses for poor Medicare beneficiaries); *Id.* at §9404(c)(1), 100 Stat. 1874, 2057 (Medicaid eligibility for qualified severely impaired individuals); *Id.* at §9406(c)(1), 100 Stat. 1874, 2058 (payment for aliens under Medicaid); *Id.* at §9407(d), 100 Stat. 1874, 2060 (presumptive eligibility for pregnant women); *Id.* at §9431(c), 100 Stat. 1874, 2066 (independent quality review for HMO services).

[212] OBRA '86 §9435(d), 100 Stat. 1874, 2070, *amending* COBRA §§9505(e); 9508(b); 9510(b) & 9511(b), 100 Stat. 82, 209-13 (codified as amended at scattered sections of 42 U.S.C. §§1396-1396s (1988)).

[213] OBRA '87 §4101, 101 Stat. 1330 (current version 42 U.S.C. §1396a(a)(10)(A) (Law. Co-op. 1985 & Supp. 1990)) (benefits for children and mothers); OBRA '87 §§4201-4214, 101 Stat. 1330 (current version 42 U.S.C. §1396r (Law. Co-op. 1985 & Supp. 1990)) (nursing home reform).

[214] Inst. of Med., Improving the Quality of Care in Nursing Homes (1986).

[215] Survey and Certification of Health Care Facilities, 47 Fed. Reg. 23,407-14 (to be codified at 42 CFR §490.1-490.60, 405.1901-405.1913, 431.610, 441.15, 442.1-442.112) (proposed May 27, 1982). *See* Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess., Medicare and Medicaid Health Budget

This Notice of Proposed Rule Making was part of a controversial initiative of the Reagan administration to deregulate the nursing home industry.

The Institute of Medicine found serious problems with the quality of care and treatment of patients in nursing homes and reported:

> There is a broad consensus that government regulation of nursing homes, as it now functions, is not satisfactory because it allows too many marginal or substandard nursing homes to continue in operation.[216]

The Institute of Medicine proceeded to recommend major reforms in the conditions of participation that establish standards for nursing homes serving Medicare and Medicaid beneficiaries, the survey and certification process by which HCFA and states monitor compliance with conditions of participation and the enforcement procedures by which noncompliance is punished and deterred.[217] The basic thrust of these recommendations was to focus on regulation to assure that patients actually receive high quality services and respectful treatment rather than just determining whether nursing homes are theoretically able to provide such care and treatment.

The nursing home reforms in OBRA '87 faithfully track the Institute of Medicine's recommendations. OBRA '87 included detailed provisions in the statute about how states and providers should implement the statutory mandates, clearly in an attempt to alleviate the need for detailed guidance that agency rules and policies would customarily provide. There were also detailed requirements for determining the quality of nursing home services[218] and the rights of nursing home residents.[219] The nursing home reforms also included changes in the procedures by which states, on HCFA's behalf, survey and certify nursing homes to ensure that nursing homes are actually meeting the conditions of participation for the Medicare and Medicaid programs.[220] In addition, these reforms established extensive enforcement procedures to ensure compliance with the new requirements for nursing homes.[221]

Reconciliation Amendments of 1987 76-77 (Comm. Print. 1987) [Hereinafter Health Budget Reconciliation Amendments of 1987].

[216] Inst. of Med., *supra* note 214, at 2.

[217] Inst. of Med., *supra* note 214. *See* Health Budget Reconciliation Amendments of 1987, *supra* note 214, at 77.

[218] OBRA '87 §4211(b), 101 Stat. 1330, 1330-183 (codified at 42 U.S.C. §1396r(b) (1988)).

[219] OBRA '87 §4211(a), 101 Stat. 1330, 1330-188 (codified at 42 U.S.C. §1396r(c) (1988)).

[220] OBRA '87 §4212, 101 Stat. 1330, 1330-207 (codified at 42 U.S.C. §1396r(g) (1988)).

[221] OBRA '87 §4213, 101 Stat. 1330, 1330-213-19 (codified at 42 U.S.C. §1396r(h) (1988)).

For these nursing home reforms, Congress did not explicitly require promulgation of regulations except with respect to one situation where Congress had previously mandated implementing regulations.[222] In this instance, Congress specifically provided that if HCFA did not promulgate regulations within the specified time period, the Secretary of HHS would be deemed to have promulgated the required regulations. In other instances, however, Congress specified that HCFA establish guidelines or criteria for states to follow in implementing the new nursing home requirements.[223] Further, despite the enormous complexity and extensiveness of these reforms, Congress required states to implement the new survey and certification and also enforcement procedures whether or not HCFA had promulgated regulations.[224]

In 1988, the pace of congressionally-mandated changes in the Medicaid program slowed. In November 1987, Congress and the Reagan administration negotiated the Bipartisan Budget Agreement outlining measures to reduce the federal budget deficit.[225] Pursuant to this agreement, Congress and the Reagan administration did not propose legislation to achieve savings in the Medicaid program for fiscal year 1989.[226]

Nevertheless, in the Medicare Catastrophic Coverage Act of 1988 ("MCCA '88"), Congress made three major changes in the Medicaid program along with enacting a short-lived catastrophic health insurance benefit for the Medicare program.[227] One change required state Medicaid programs to pay all Part B premiums and co-insurance for indigent Medicare beneficiaries.[228] The second change required states to extend Medicaid coverage to pregnant women and infants whose incomes were at or below 100 percent of the federal poverty level by July 1, 1990.[229] The third change established new requirements for the treatment of income and resources of institutionalized persons whose spouses resided in the community.[230] Congress required implementation of all three of these provisions whether or not HCFA had promulgated regulations.[231] It should be noted that Congress retained these Medicaid program changes when it repealed the Medicare catastrophic insurance benefit in 1989.[232] Also, in the Family Support Act of 1988, Congress authorized continuation of Medicaid benefits for one year to persons leaving the AFDC program to facilitate the transition of such families to the work force without fear of loosing health insurance coverage.[233]

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[222] OBRA '87 §4211(f)(7), 101 Stat. 1330, 1330-202 (codified at 42 U.S.C. §1396r (1988)).

[223] OBRA '87 §4211(f)(3), 101 Stat. 1330, 1330 to 200-01 (codified at 42 U.S.C. §1396r(f) (1988)).

[224] OBRA '87 §4214, 101 Stat. 1330, 1330-219 (codified at 42 U.S.C. §1396r(g) (1988)).

[225] Executive Off. of the President, Off. of Management and Budget, Budget of the United States Government, Fiscal Year 1989, 2b-1 to 2b-2 (1988).

[226] *Id.* at 5-108.

[227] MCCA '88 §§301-303, Pub. L. No. 100-360, 102 Stat. 683, 748-64 (codified at scattered subsections of 42 U.S.C.S. §1396) (Law. Co-op. 1985 & Supp. 1990).

[228] MCCA '88 §301, 102 Stat. 683, 748-50 (to be codified at 42 U.S.C. §§1396a(a)(10)(E) and 1396d(p) (Law. Co-op. 1985 & Supp. 1990).

[229] MCCA '88 §302, 102 Stat. 683, 750-51 (codified at 42 U.S.C. §1396a(a)(10) & 1396a(1) (Law. Co-op. 1985 & Supp. 1990).

In the Omnibus Budget Reconciliation Act of 1989 ("OBRA '89"), Congress made several changes in the Medicaid program to assure improved maternal and child health services.[234] Specifically, Congress mandated that, effective April 1990, state Medicaid programs must cover children under seven and born after 1983 and pregnant women whose family income is at or below 133 percent of the federal poverty level.[235] Also, OBRA '89 required states to reestablish early and periodic screening, diagnostic and treatment (EPSDT) services for children on Medicaid.[236] Several provisions of OBRA '89 called for reforms in the payment levels for pediatricians, obstetricians, nurse practitioners as well as community and migrant health centers to assure better access to these services for poor women and children.[237] As with earlier congressional mandates, Congress required implementation whether or not HCFA promulgated regulations.[238]

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[230] MCCA '88 §303, 102 Stat. 683, 754-64 (codified at 42 U.S.C. §1396r-s (1988) (Law. Co-op. 1990).

[231] MCCA '88 §301(h), 102 Stat. 683, 748-50 (required Medicaid buy-in of premiums and cost-sharing for indigent Medicare beneficiaries); *Id.* at §302(f)(1), 102 Stat. 683, 753 (coverage and payment for pregnant women and infants with incomes below the poverty line); *Id.* at §§303(g)(1)(A), (2)(A) & (3), 102 Stat. 683, 763-64 (protection of income and resources of couple for maintenance of community spouse).

[232] Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (codified at scattered subsections of U.S.C.S. §1395) (Law. Co-op. 1985 & Supp. 1990).

[233] MCCA §303, Pub. L. No. 100-485, 102 Stat. 2343, 2385-93 (codified as amended at 42 U.S.C. §1396r-6 (e) (Law. Co-op. 1985 & Supp. 1990).

[234] OBRA '89 §§6401-6407, 103 Stat. 2106, 2258-2267 (current version at scattered sections of 42 U.S.C.S. §§1396-1396s) (Law. Co-op. 1985 & Supp. 1990).

[235] OBRA '89 §6401, 103 Stat. 2106, 2258 (current version at 42 U.S.C. §1396a(a)(10)(A)) (Law. Co-op. 1985 & Supp. 1990).

[236] OBRA '89 §6403, 103 Stat. 2106, 2262-64 (codified at 42 U.S.C.S. §1396(d)(r) & 1396a(a)(30)) (Law Co-op. 1985 & Supp. 1990).

[237] OBRA '89 §6402, 6405-6406, 103 Stat. 2106, 2260-2265 (codified at scattered sections of 42 U.S.C.S. §§1396-1396s) (Law. Co-op 1985 & Supp. 1990). Covered services include obstetric and pediatric services, federally qualified health center services and nurse practitioner services.

In OBRA '90, Congress made several major changes in the Medicaid program including some significant benefit expansions for children and pregnant mothers.[239] Specifically, OBRA '90 contained extensive new rebate requirements for Medicaid purchases of perscription drugs financed by Medicaid and mandated drug use review for outpatient perscription drugs for Medicaid beneficiaries.[240] Also, OBRA '90 modified some requirements for nursing home reform and specifically prohibited HCFA from taking compliance actions against a state regarding several nursing reform requirements, e.g., preadmission screening and annual resident review, before HCFA issues implementing regulations or guidelines.[241]

B. Problems with Medicaid Rule and Policy Making

Since 1981, one fundamental problem with rule and policy making in the Medicaid program has emerged: HCFA's inability to promulgate policy and rules, whether procedural, interpretative or legislative, in a timely and expeditious manner. In many cases, HCFA has provided states with no rules or policies at all to implement a congressionally-mandated change by a deadline or even approved a state plan amendment which would allow states to implement a legislative change without a subsequent disallowance action or error rate penalty.

Clearly HCFA, and the states, have had difficulty digesting congressionally-mandated changes in the Medicaid program since 1981. As one HHS official commented, statutory changes are "outrunning [HCFA's] physical ability to keep up." Indeed, HCFA experienced a decrease in personnel in the 1980s to such a degree that, in OBRA '89, Congress mandated a study of HCFA's personnel problems and needs by the National Academy of Public Administration.[242]

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[238] OBRA '89 §6401(c), 103 Stat. 2106, 2258 (mandatory coverage of certain low income pregnant women and children); §6402(d)(2)(A), 103 Stat. 2106, 2261 (payment for obstetric and pediatric services); §6403(e), 103 Stat. 2106, 2264 (EPSDT defined); §6404(d), 103 Stat. 2106, 2264 (payment for federally-qualified health center services); §6406(b), 103 Stat. 2106, 2266 (required coordination with Special Supplemental Food Program for Women and Children).

[239] OBRA '90, 104 Stat. 1388. *See supra* note 97.

[240] OBRA '90, §4401, 104 Stat. 1388, (to be codified at 42 U.S.C.§1396b(i)).

[241] OBRA '90, §4801, 104 Stat. 1388, (to be codified at 42 U.S.C.§1396r).

[242] OBRA '89 §6223, 103 Stat. 2256.

It is fair to say that the congestion in the process for making rules and policies at both the federal and state level has been aggravated by Congress' practice of requiring states and HCFA to implement legislative changes by specific dates regardless of whether HCFA has promulgated regulations to implement the program change. Yet, Congress has apparently invoked this practice because it concluded that HCFA was too slow in promulgating regulations to implement legislated benefit expansions and other program changes thereby frustrating congressional intent.

1. HCFA Policy and Rulemaking Since 1981

a. Notice-and-Comment Rulemaking

Since the summer of 1981, HCFA has promulgated 64 interim final or final rules just for the Medicaid program alone; most of which addressed cost containment or quality control initiatives of HCFA and the Executive Branch.[243] These final rules are in addition to the 43 final or interim final rules that HCFA promulgated for both the Medicare and Medicaid programs.[244] While it is beyond the scope of this article to discuss every Medicaid rulemaking, some important developments in legislative rulemaking for the Medicaid program since 1981 are noteworthy.

On September 30 and October 1, 1981, HCFA promulgated eight interim final rules with a comment period to implement the comprehensive changes to the Medicaid program enacted in OBRA '81.[245] These rules addressed all of the major changes in the Medicaid program that the Reagan administration had pushed in its 1981 Medicaid reform initiative.[246] The rules included the OBRA '81 authorities for waivers regarding primary care case management systems and home and community based services, reductions in federal payments to states, and less restrictive eligibility and coverage criteria and provider payment methodologies. This rulemaking effort was truly a tour de force; HCFA promulgated eight complex interim final rules to implement these changes by October 1, 1981 when OBRA '81 was passed only a few months before.

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[243] *See* Appendix A.

[244] *See* Appendix B.

[245] Payment for Long term Care Facility Services and Inpatient Hospital Services, 46 Fed. Reg. 47,971 (1981) (codified at 42 CFR 447.250-447.271 (1981)) (proposed Sept. 30, 1981); Eligibility and Coverage Criteria, 46 Fed. Reg. 47, 984-93 (1981) (codified at scattereed sections of 435.1-435.852, 436.2-436.852, 440.210-440.230, 441.10 (1981)) (proposed Sept. 30, 1981); Reductions in Payments to States, 46 Fed. Reg. 48,001-03 (1981) (codified at 42 CFR §§433.201-433.217, 45 CFR 201.5 (1981)) (proposed Sept. 30, 1981); Offset Based on Third-Party Liability Recoveries against Reductions in Medicaid Payments, 46 Fed. Reg. 48,006 (1981) (proposed Sept. 30, 1981); Freedom of Choice; Waivers of and Exceptions to State Plan Requirements, 46 Fed. Reg. 48,527 (1981) (codified at 42 CFR §§431.50-431.55, 440.200, 440.250 (1981)) (proposed Oct. 1, 1981); Home and Community-Based Services, 46 Fed. Reg. 48,539-41 (1981) (codified at 42 CFR §§431.50, 435.232, 435.735, 435.726, 440.1, 440.170, 440.250 (1981)) (proposed Oct. 1, 1981); Miscellaneous Medicaid Provisions--Increased State Flexibility, 46 Fed. Reg. 48,559-61 (codified at 42 CFR §§430.1, 433.10, 435.2, 441.155, 447.200, 447.300, 447.302, 447.304, 447.342, 456.1, 456.60, 456.160, 456.260, 456.360, 456.652 (1981)) (proposed Oct. 1, 1981); Payment for Long term Care Facility Services and

During the next three years, HCFA promulgated 20 final rules for the Medicaid program many of which implemented Reagan administration initiatives.[247] These rules concerned relatively technical matters but included many cost containment and eligibility policy changes. Of particular note, a 1983 final rule addressed deeming of income between spouses necessitated by the Supreme Court's decision in Schweiker v. Gray Panthers,[248] only eleven months after promulgating the proposed rule.[249] By 1985, the pace of legislative rulemaking for the Medicaid program increased. From 1985 through 1988, HCFA promulgated 26 final rules addressing eligibility of beneficiaries, payment of providers, cost containment measures and other more technical matters.[250] For most of these final rules, the time between publication of the proposed and final rules was about two years.

During this period, HCFA also exhibited delays in promulgating rules to implement congressionally-mandated benefit expansions. For example, HCFA promulgated the NPRM to implement the expansion of optional eligibility for infants, children and pregnant women,[251] which Congress enacted in DEFRA over a year before.[252] HCFA promulgated the final rule two years after the

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Inpatient Hospital Services, 46 Fed. Reg. 47,964 (codified at 42 CFR pts. 447 (1981) (proposed Sept. 30, 1981).).

[246] *See* Executive Off. of the President, Off. of Management and Budget, Fiscal Year 1982 Budget Revisions 70 (1981).

[247] *See* Appendix A.

[248] 453 U.S. 34 (1981). *See supra* note 111 and accompanying text.

[249] 42 CFR §§435.121, 435.223, 435.734, 436.711 (1983). Deeming of Income between Spouses: Categorically Needy, 47 Fed. Reg. 31,899 (1982) (codified at 42 CFR §§435.121, 435.703, 435.734, 436.711 (proposed July 23, 1982)).

[250] *See* Appendix A.

[251] Coverage of Qualified Pregnant Women and Children and Newborn Children, 50 Fed. Reg. 48, 102 (1985) (codified at 42 CFR §§435.115-435.117, 435.301, 436.2, 436.114, 436.301 (1988)) (proposed Nov. 21, 1985).

[252] *See supra* note 189 and accompanying text.

NPRM and three years after Congress initiated the eligibility expansion for these groups in DEFRA.[253]

By 1989, the pace of rulemaking for the Medicaid program abated. HCFA promulgated five final rules dealing with relatively technical issues such as eligibility of beneficiaries, payment of providers and state administration.[254] Again, the time between publication of the proposed and final rules was often over a year. In the case of legislative rules, HCFA has generally taken more than a year to promulgate final rules. Indeed, often HCFA takes a year from enactment to publish an NPRM. HCFA appears to be fast only in getting out legislative rules that involve relatively technical program changes or measures, e.g., modifications of the error rate penalty procedures, which save federal monies.[255] During the early 1980s, HCFA was quite expeditious in promulgating rules to implement Executive Branch initiatives.[256] On the other hand, HCFA was quite slow to implement legislative rules for congressionally-mandated benefit expansions,[257] taking, for example, three years to promulgate a final rule implementing the initial benefit expansion for mothers and children.[258]

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[253] 42 CFR §§435.115, 435.301, 436.2, 436.114, 436.301 (1988). Coverage of Qualified Pregnant Women and Children and Newborn Children, 50 Fed. Reg. 48,102 (1985) (codified at 42 CFR §§435.115, 435.301, 436.2, 436.114, 436.301) (proposed Nov. 21, 1985).

[254] *See* Appendix A.

[255] *See* Appendix A.

[256] For example, the interim final rule implementing HCFA initiatives regarding HMOs and similar plans was issued thirteen months after the NPRM. 42 CFR §§434.1-434.78, 435.3, 435.212, 435.326, 447.361-447.362 (1984). Contracts with Health Maintenance Organizations and Prepaid Health Plans, 47 Fed. Reg. 43,087 (1982) (proposed Sept. 30, 1982). Another interim final rule implemented a cost containment measure eleven months after the NPRM. 42 CFR §433.38 (1983). Interest on Disputed Claims, 47 Fed. Reg. 29,275 (1982) (proposed July 6, 1982). Similarly, in 1983, HCFA published an interim final rule revising the methodology for calculating error rates on claims for Medicaid's quality control system followed by a final rule six months later. 42 CFR §§431.800-431.803 (1983). 42 CFR §431.800-431.803 (1984). A 1984 final rule revised the previous rules for calculating claim error rates again. 42 CFR §431.803 (1984). A 1984 final rule implemented a HCFA initiative to end mandated coverage of early and periodic screening, diagnosis and treatment (EPSDT) services for children two months after publication of the NPRM. 42 CFR §§441.50-441.62 (1985). 48 Fed. Reg. 38,016-17 (1983) (proposed Aug. 22, 1983).

[257] *See* Appendix A.

[258] *See supra* note 253 and accompanying text. *See also* Children's Defense Fund, Comments of the Children's Defense Fund on the Medicaid Rulemaking Process for the Federal Administrative Conference 3-4 (Aug. 1990) [hereinafter Children's Defense Fund Comments].

b. Use of Interim Final Rulemaking

Of serious concern is HCFA's use of interim final rules to implement major Medicaid program changes without subsequently issuing final rules. In 1981, HCFA promulgated seven interim final rules to implement the major changes in the Medicaid program enacted in OBRA '81.[259] In only a few instances has HCFA reissued these rules as final rules after accounting for comments. HCFA has continued using interim final rules for promulgating Medicaid policy.[260] This practice regarding the use of interim final rules as well as the content of these rules has generated considerable friction between Congress and the Executive Branch.

For example, in 1981, HCFA issued an interim final rule imposing restrictions on the financial critiera that states could use in determining eligibility for so-called "medically needy" persons and creating new authority to eliminate certain children from the program.[261] These rules contained provisions that were also contained in the Administration's legislative proposals for OBRA '81 that Congress did not incorporate into OBRA '81.[262] In TEFRA, Congress sought to overrule these interim final rules by setting forth the financial criteria for determining eligiblity.[263] HCFA did not modify its interim final rule to incorporate the TEFRA provisions. In DEFRA '84, Congress imposed a moratorium on the enforcement of the 1981 interim final regulations.[264] When HCFA did not modify its interim final regulations despite the moratorium, Congress passed legislation further directing HCFA to correct the inaccurate regulatory policy in 1987 and prohibiting HCFA from imposing any penalties for states' failure to comply with its interim final rule.[265] HCFA has yet to amend its interim final rules to address the moritorium and other constraints imposed by Congress to modify rules which Congress believed were contrary to legislative mandate.[266]

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[259] *See supra* notes 256-57 and accompanying text.

[260] *See, e.g.*, Interim Final Rule, Public Notice of Changes in Method or Level of Reimbursement Charges, 46 Fed. Reg. 58,677 (codified at 42 CFR pt. 447 (1988)) (proposed Dec. 3, 1981); Interim Final Rule, State Residency for Institutionalized Individuals, 47 Fed. Reg. 27,076 (codified at 42 CFR pts. 435 and 436 (1988)) (proposed June 23, 1982); Interim Final Rule, Reduction in Error Rate Tolerance, Medicaid Quality Control Program, 48 Fed. Reg. 29,450 (codified at 42 CFR pt. 431 (1988)) (proposed at June 24, 1983); Interim Final Rule, Targeting Information for Income and Eligibility Verification Systems, 54 Fed. Reg. 8738 (to be codified at 42 CFR pts. 433 and 435) (proposed Mar. 2, 1989).

[261] Interim Final Rule, Eligibility and Coverage Criteria, 46 Fed. Reg. 47,976 (codified at 42 CFR pts. 435, 436, 440 and 441 (1988)) (proposed Sept. 30, 1981).

[262] *See* A White House Report, H.R. Doc. No. 21, 97th Cong., 1st Sess. (1981); Budget Reform Plan, H.R. Doc. No. 21, 97th Cong., 1st Sess (1981); Fiscal Year 1982 Budget Revisions--Message from the President, H.R. Doc. No. 26, 97th Cong., 1st Sess (1981); Office of Management and Budget, Fiscal Year 1982 Budget Revisions: Additional Details on Budget Savings (1981), also published as H.R. Doc. 41, 97th Cong., 1st Sess. (1981).

[263] TEFRA '82 §137(a)(7)-(9), 96 Stat. 324, 376-381 (codified as amended at 42 U.S.C. §§1396a(a)(10)).

[264] DEFRA '84 §2373(c), 98 Stat. 494, 1112 (codified as amended at 42 U.S.C. §1396a(a)(10)(A) & (B) (1989)).

c. Interpretative and Procedural Rulemaking

Since 1981, HCFA has also published an avalanche of interpretative and procedural rules in its State Medicaid Manual and other sources to implement legislative changes as well as to make program changes deemed necessary in its own discretion. Specifically, as of February 1990, in the State Medicaid Manual, HCFA had issued over 60 transmittals on state administration, 39 on eligibility policy, 44 on coverage of health care services, ten on payment of providers and seven on quality control since the enactment of OBRA '81.[267] These transmittals represent only a small portion of the program guidance that HCFA has issued for the Medicaid program during this period.

HCFA has been quite slow in issuing transmittals to implement legislative changes. For example, MCCA '88 established new requirements for deeming of income and resources of persons whose spouses are institutionalized to be effective October 1, 1989. HCFA issued a transmittal outlining complicated requirements to implement these and other MCCA '88 provisions in October 1989.[268] This posed a hardship on states which were required to implement these provisions regardless of whether HCFA had promulgated regulations or other program instructions by October 1989.

2. Procedural Challenges to Medicaid Rulemaking

In making interpretative and procedural rules, HCFA faces the perennial problem of whether the rule has legislative effect and should be promulgated according to the notice-and-comment procedures of §553 of the APA, or whether it is interpretative or procedural and can be issued without following §553 procedures. Beneficiaries and providers will invariably claim that deficiencies exist in the procedures used in making rules or policy in order to achieve their ultimate objective of thwarting the implementation of a rule or policy they oppose on substantive grounds. Indeed, such procedural challenges are often proxies for profound ideological differences over the subject of the rule or policy. Yet the fundamental purpose of notice-and-comment rulemaking is to provide a process where political and ideological differences about a proposed rule or policy can surface and hopefully be resolved or at least accommodated.

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[265] Medicare and Medicaid Patient Program Protection Act of 1987 §9, Pub. L. No. 100-93, 100 Stat. 680, 695-696 (amending DEFRA §2373(c), 98 Stat. 1112).

[266] *See* Children's Defense Fund, Comments, *supra* note 257.

[267] Health Care Fin. Admin., State Medicaid Manual Parts 2-7 (1988).

[268] Health Care Fin. Admin., State Medicaid Manual, Transmittal No. 39 (Oct. 1989).

No other area exemplifies this problem with rule and policy making for the Medicaid program since 1981 better than nursing home reform and the litigation it spawned. This litigation also exemplifies the difficult problem posed for HCFA, as well as states, in implementing congressionally-mandated changes under tight deadlines and with limited resources.

In 1982, as discussed above, HCFA issued a controversial NPRM proposing to reduce direct government involvement in monitoring compliance with conditions of participation for nursing homes and thereby deregulate the nursing home industry substantially.[269] As noted above, this NPRM generated great opposition among advocates for beneficiaries and Democrats in Congress.[270] Indeed, Congress imposed a legislative moratorium on nursing home deregulation in 1982.[271] In 1987, after the Institute of Medicine's comprehensive study of federal regulation of nursing homes,[272] HCFA issued another NPRM prescribing conditions of participation incorporating many of the Institute of Medicine's recommendations.[273] Congress enacted OBRA '87 with its comprehensive nursing home reforms again following most of the Institute of Medicine's recommendations.[274] HCFA did not publish another NPRM reflecting OBRA '87 changes. On February 2, 1989, HCFA promulgated final rules on conditions of participation which incorporated most of the comprehensive nursing home reform provisions of OBRA '87 and the Institute of Medicine recommendations.[275] In Gray Panthers Advocacy Committee v. Sullivan,[276] nursing home residents and their advocates sought to enjoin implementation of the new conditions of participation on grounds that HCFA published the final regulations implementing OBRA '87 requirements without complying with the notice-and-comment requirements of §553 of the APA.[277] Plaintiffs alleged further that HCFA failed to incorporate some of the mandated changes of OBRA '87 in the conditions of participation for nursing homes.[278] The United States District Court for the District of Columbia ruled that no explicit statutory provisions of OBRA '87 required that HCFA promulgate legislative rules designed to implement OBRA '87 nursing home reform and that HCFA did not have to use notice-and-comment rulemaking with respect to new provisions in the rule that restated verbatim language of OBRA '87. The court stated: "[W]here the final rule simply restates the specific statutory language, the interests of nursing home residents are protected by virtue of the legislative process in Congress."[279] This case is important in its conclusion that, where Congress has not required implementing regulations and has been quite detailed in its statutory prescriptions, courts will probably not conclude that HCFA should have followed §553 notice-and-comment rulemaking procedures in promulgating rules pertaining to such statutory provisions.

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[269] Survey and Certification of Health Care Facilities, 47 Fed. Reg. 23,404 (1982) (codified at §§490.1-490.60, 405.1901-405.1913, 431.610, 441.15, 442.1-442.112 (1983)) (proposed May 27, 1982). *See supra* note 215 and accompanying text.

[270] *See supra* note 215 and accompanying text.

[271] *See supra* note 1614 and accompanying text.

[272] Inst. of Med., *supra* note 214.

[273] Conditions of Participation for Long Term Care Facilities, 52 Fed. Reg. 38,582-01 (1985) (to be codified at 42 CFR pts. 405, 442, and 483) (proposed Oct. 16, 1987).

[274] *See supra* note 151 and accompanying text.

[275] Conditions of Participation for Long Term Care Facilities, 54 Fed. Reg. 5316 (Feb. 2, 1989), 42 CFR pts 405, 442, 447, 488, 489 and 498 (1989).

[276] [1989-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶37,947 (D.D.C. June 28, 1989).

A far more controversial issue has been the survey process for determining nursing home compliance with the conditions of participation. HCFA conducted two rulemaking proceedings in the 1980s regarding the form and methodology used in conducting the survey of nursing homes.[280]

In Estate of Smith v. O'Halloran,[281] Medicaid nursing home residents in Colorado brought a class action challenging HCFA's failure to make a legislative rule that specified how the survey and certification procedures for nursing homes would assure high quality care for nursing home residents on Medicaid. In 1984, the Tenth Circuit Court of Appeals, reversing the district court, ruled that the Secretary of HHS had a "duty to promulgate regulations which will enable [the Secretary] to be informed as to whether nursing facilities receiving federal Medicaid funds are actually providing high quality medical care."[282] Having found that duty, the Tenth Circuit felt bound to "determine whether the enforcement mechanism promulgated by the Secretary satisfie[d] that duty."[283] The court concluded that the existing enforcement mechanism, focusing on characteristics of the facility only and not on the direct care and treatment of the patients, did not comport with the Secretary's duty.[284]

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[277] *See supra* note 48 and accompanying text.

[278] [1989-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶37,947 at 20,434.

[279] Id.

[280] Long term Care Survey, 50 Fed. Reg. 45,584 (1985) (to be codified at 42 CFR pts. 405 and 442) (proposed Oct. 31, 1985); Long term Care Survey, 51 Fed. Reg. 21,550 (1986) (codified at 42 CFR pts. 405 and 442 (1988)); Long term Care Survey, 52 Fed. Reg. 24,752 (1987) (to be codified at 42 CFR pts. 405, 442 and 488) (proposed July 1, 1987); Long term Care Survey, 53 Fed. Reg. 22,850 (1988) (codified at 42 CFR pts. 405, 442 and 448 (1988)).

[281] 557 F. Supp. 289 (D. Colo. 1983), *rev'd and rem'd sub. nom.*, 747 F.2d 583 (10th Cir. 1984), 656 F. Supp. 1093 (D. Colo. 1987), *memorandum opinion and order*, 675 F. Supp. 586 (D. Colo. 1987), *ordered accordingly*.

This case was recently the basis of a "made-for-TV" movie entitled: "When You Remember Me." *See* TV Guide, Oct. 7 (1990).

In 1985, HCFA initiated rulemaking with an NPRM that generally described the survey form and methodology used in the survey and certification of nursing homes[285] and promulgated the final rule in June 1986.[286] The preamble to the final rule described, generally, the new "Patient Care Services" ("PaCS") System for the survey and certification process. The PaCS System, developed by HCFA, required surveyors to interview a representative sample of a nursing home's residents, evaluate their physical condition according to prescribed criteria, examine the residents' medical records, and observe dining, eating assistance and drug administration. There were only two significant changes in the language of the former rule regarding survey procedures: The nursing home's provider agreement with HCFA was no longer definitive evidence that the facility met federal requirements, and the surveying agency was required to use federal "forms, methods and procedures" for the PaCS survey.[287]

On remand, the district court in Estate of Smith invalidated these new rules on several procedural and substantive grounds. First, HCFA's failure to extend the sixty day comment period was arbitrary and capricious because of the controversy over the NPRM and the request of many interested parties pending publication of the Institute of Medicine's study on the regulation of nursing homes.[288] The court was also concerned that the PaCS survey text as well as the accompanying methodology and forms were not included in either the NPRM or the final rule. The court concluded that the legislative rule mandated by the Tenth Circuit should have specifically included the PaCS survey form and explicitly addressed the methodologies and procedures for administering the PaCS system. Ordering the Secretary to issue a new NPRM by June 1, 1987, the court stated:

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[282] Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984).

[283] *Id.*

[284] *Id.* at 589-90.

[285] Long term Care Survey, 50 Fed. Reg. 45,584 (1985) (to be codified at 42 CFR pts. 405 and 442) (proposed Oct. 31, 1985).

[286] Long-Time Care Survey, 51 Fed. Reg. 21,550 (June 13, 1986); 42 CFR §§405 & 442.30 (1988).

[287] *Id.* at §442.30(a)(4).

[288] *Estate of Smith*, 656 F. Supp. at 1099; *see also* Inst. of Med., *supra* note 214.

> The refusal of the Secretary to be bound by specific procedures, guidelines and forms is a dereliction of his duty as defined in this litigation. The essence of the ruling of the Court of Appeals is that the United States Congress has directed the Secretary to require the facilities to provide such care to Medicaid patients as the Secretary directs through the inspection of care program and the survey certification program. There is no legislative definition of 'quality health care,' and there can be none. It is something which emanates from the process of regulation. The methodology prescribed is the vehicle by which the Secretary will become informed as to whether the nursing facilities are actually providing high quality medical care. Estate of Smith v. Heckler, 747 F.2d at 591. Thus, the method is the medium both for defining the expected level of care and for determining performance.[289]

On July 1, 1987, HCFA published a revised NPRM setting forth a brief rule which referenced five appendices.[290] The appendices, also published in the Federal Register, included PaCS survey forms on which findings of surveyors could be reported, work sheets, procedural guidelines on the methodologies for conducting the survey and a "resource book" to be used by surveyors in making "informed professional judgments" on facility compliance.[291] When plaintiffs' in Smith challenged this NPRM, HCFA argued that the proposed survey forms, guidelines and other material contained in the appendices were interpretative and procedural rules and, thus, only had to be published for meaningful comment and not for inclusion in the text of the final legislative rule.[292] HCFA argued further that including the specific procedures, guidelines and forms in a legislative rule was undesirable since their subsequent modification and improvements would be slow and difficult.[293]

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[289] *Estate of Smith*, 656 F. Supp. at 1096-97.

[290] Long term Care Survey, 52 Fed. Reg. 24,752 (1987) (to be codified at 42 CFR pts. 405 and 442) (proposed July 1, 1987).

[291] *See id.* at 24,761-88.

[292] *Estate of Smith*, 675 F. Supp. at 588.

[293] *Id.*

The court rejected HCFA's arguments and found HCFA in "technical" contempt of court for failing to comply with the court's previous opinion.[294] The court concluded that the Secretary had to establish "uniform standards for facility performance and a uniform methodology for evaluating that performance to ensure the delivery of high quality health care" and that the regulations "required for these purposes must be prescriptive and legislative."[295] Further, the court emphasized that the PaCS survey forms established "substantive requirements for the state and the provider facilities" and that facilities out of compliance would lose their provider agreement which, the court asserted, "can certainly be considered a property right subject to due process protection."[296] In responding to HCFA's arguments that quality health care cannot be legislatively defined and that surveyors exercising their professional judgment will "give meaning to [the] phrase," the court stated its essential objections to new HCFA's rulemaking:

> The principles in the rule state that the survey process is the means and federal forms will be used. What is the process and what are the forms? They can be changed at any time for any reason and the Secretary is not bound because the rule does not articulate any methodology. Additionally, the required "elements" of a survey set forth in section 442.30(a)(7) do not give any direction or specify any content for the steps stated. Moreover, the Secretary's benign approach in relying on professional judgment rings hollow when there is no federal requirement of professionals on the survey team.[297]

This is a troubling decision for an agency faced with the need to issue a large volume of program guidance on highly technical issues in relatively short time frames. Clearly HCFA cannot use notice-and-comment rulemaking for all such guidance, particularly for highly technical questions. In many respects, it would seem that the survey forms used by surveyors might be the kind of procedural and interpretative program guidance that need not be promulgated with notice-and-comment rulemaking. On the other hand, the poor, aged and disabled nursing home residents directly affected by the survey are among the most vulnerable in our society and the record of state and federal regulation of nursing homes to protect these residents has not been good.[298] Given this situation, it is not surprising that the district court in Estate of Smith took a strict view of what rulemaking procedures were required in this case.

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[294] *Id.*

The court pointed out that the contempt was "technical" because "it is not the result of a contumnacious attitude or a willful disregard of this court's authority and order."

[295] *Id.* at 589.

[296] *Id.* It should be pointed out that the Supreme Court has specifically ruled that nursing homes do not have a property interest in the Medicaid program. O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980).

[297] *Estate of Smith*, 675 S. Fupp. at 590.

Another example of the problems in Medicaid rule and policy making at the federal level are the requirements in OBRA '87 on "minimum criteria" for states to use in making decisions about admission of individuals with mental illness or retardation to nursing homes.[299] OBRA '87 mandated that states have such preadmission screening programs in place by January 1, 1989 and provided that the failure of the Secretary to establish criteria "shall not relieve any State of its responsibility" to conduct preadmission screening.[300] If nursing homes failed to apply HCFA's preadmission screening criteria to potential patients, they were subject to sanctions, e.g., decertification, under the Medicare and Medicaid programs.[301] In September 1988, less than three months before the effective date, HCFA developed and circulated draft criteria.[302] There have been three lawsuits by nursing homes and hospitals, their associations and Medicaid beneficiaries seeking to enjoin implementation of the OBRA '87 preadmission screening criteria because HCFA failed to comply with notice-and-comment rulemaking procedures under §553 of the APA or state rulemaking requirements.

In Texas Health Care Association v. Bowen,[303] a federal district court, in granting plaintiffs' motion for a preliminary injunction, ruled that the preadmission screening criteria were legislative rules that should have been promulgated according to APA notice-and-comment rulemaking procedures because it "appears the Congress' delegation of authority to the Secretary to flesh out the statute probably bestows legislative effect upon the Secretary's criteria."[304] The court continued: "It is thus unlikely that Congress intended the Secretary to develop such important criteria outside the requirements of the APA."[305]

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[298] *See generally* Inst. of Med., *supra* note 214.

[299] OBRA '87, 42 U.S.C. §1396r(f)(8) (1988).

[300] OBRA '87, 42 U.S.C. §1396r(e)(7)(A) (1988).

[301] OBRA '87, 42 U.S.C. §1396r(h) (1988).

[302] Health Care Fin. Admin., Minimum Federal Criteria for States to Use in Making Preadmission and Annual Review Determinations About Admission to Continued Residence in Nursing Facilities for Individuals Who Have Mental Illness or Mental Retardation (Sept. 1988).

[303] 710 F. Supp. 1109 (W.D. Tex. 1989).

[304] *Id.* at 1113, *relying on*, Batterton v. Francis, 432 U.S. 416 (1977); Herwig v. Ray, 455 U.S. 265 (1982).

[305] *Texas Health Care Ass'n*, 710 F. Supp. at 1113.

The court also commented on the impact of the congressional mandate that states implement the preadmission screening program irrespective of whether HCFA had published the preadmission screening criteria.[306] Specifically, the court noted that Texas had difficulty in complying with its own legal requirements for rulemaking. Further, HCFA's publication of multiple drafts of the criteria generated confusion as the state and nursing homes sought to comply with the preadmission screening requirements. In concluding that plaintiffs would suffer irreparable injury without the injunction, the court pointed out that patients in need would be denied services because nursing homes were uncertain whether they would ultimately be paid for care given the confusion over the criteria.[307]

In Rayford v. Bowen,[308] another federal district court concluded that substantive rules must be promulgated pursuant to §553 notice-and-comment rulemaking procedures. The court said: "[t]he paradigm of a substantive rule is one which requires obedience on pain of punishment and the draft criteria fit this definition like a glove."[309] The court also concluded that the criteria could not be interpretative rules essentially because they were prescribing the regulatory structure through which the statute was implemented. The court reasoned further that the criteria were not "based on language found in the statute" and "if Congress leaves gaps in a statute for an agency to fill, then the rules which plug those holes are not interpretations."[310]

In addition, HCFA argued that Congress created an exception from APA requirements in the case of the criteria by mandating that states implement the preadmission screening criteria regardless of whether HCFA promulgated implementing regulations. The court asserted that, in OBRA '87, Congress had created "a short-lived exception to the APA" for the time period from January 1, 1989 until HCFA finally promulgated implementing regulations.[311] As the court stated: "In short, OBRA creates an exception to the APA only insofar as is needed to ensure that the screening process is in place by 1 January 1989. To give it any greater effect would frustrate the policy goals of the APA."[312] The court ruled that, until HCFA promulgated final regulations, nursing homes could not be penalized through decertification for failure to comply with the preadmission screening criteria.[313]

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[306] *Id.* at 1114.

[307] *Id.* at 1115.

[308] 715 F.Supp. 1347 (W.D. La. 1989).

[309] *Id.* at 1353.

[310] *Id.*, *relying on* Brown Express, Inc. v. U.S., 607 F.2d 695 (5th Cir. 1979).

[311] *Id.* at 1353.

[312] *Id.* at 1354.

[313] *Id.* at 1353-55.

The Rayford court also commented extensively on the confusion that HCFA's handling of the preadmission screening criteria caused for states, nursing homes and Medicaid beneficiaries. The court pointed out that HCFA had published five drafts of the criteria between the filing of the lawsuit and the court's decision.[314] The court also showed that, to avoid Federal penalties, Louisiana had published a rule providing that the state and providers would comply with HCFA's draft criteria under a Louisiana statute that permits the state to promulgate rules without notice.[315]

However, in Idaho Health Care Association v. Sullivan,[316] the federal district court for Idaho ruled that HCFA's preadmission screening criteria were not legislative rules. The court was persuaded by the fact that Congress had specifically mandated that HCFA develop "criteria" rather than "rules"[317] and further that HCFA developed "regulations" elsewhere in the statute.[318] The court also noted that HCFA had agreed not to take punitive action, i.e.,, decertification, against nursing homes that were out of compliance with the guidelines.[319]

The cases concerning the preadmission screening criteria and nursing home reform have been generally troubling because they demonstrate that, unless HCFA uses notice-and-comment rulemaking, it is exposed to successful procedural challenges from opponents of the rule even where the rules involved are highly technical and detailed. The question of what distinguishes a "legislative" rule from the other rules, for which §553 notice-and-comment rulemaking procedures are not required, has troubled agencies, courts, and commentators since the enactment of the APA in 1946.[320] The basic problem is that agency rules and policies designated as interpretative or procedural rules often require a regulated party to modify behavior, as would a statute or legislative rule. On the other hand, legislative rules also explain and clarify statutes, establish procedures and otherwise set agency policy. Furthermore, as the United States Court of Appeals for the District of Columbia aptly observed, distinguishing between a legislative or interpretive rule is "an extraordinarily case-specific endeavor."[321]

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[314] *Id.* at 1349.

[315] *Id.*

[316] 716 F. Supp. 464 (D. Idaho 1989).

[317] *Rayford*, 715 F. Supp. at 1352-53.

[318] *Idaho Health Care Ass'n*, 716 F. Supp. at 470.

[319] *Id.*

[320] *See* Davis, *Administrative Rules--Interpretative, Legislative and Retroactive*, 57 Yale L. J. 919 (1948); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 Admin. L. Rev. 101 (1971); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 Geo. L. J. 1047 (1976); Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 520 (1977) [hereinafter Asimow, *Public Participation*]; Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules*, 29 Admin. L. Rev. 367 (1977); Mayton, *A Concept of a Rule and the "Substantive Impact" Test in Rulemaking*, 33 Emory L. J. 889 (1984); Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L. J. 381; Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 Duke L. J. 346.

In recent years, several court decisions have done much to mitigate agencies' exposure to successful procedural challenges when they promulgate interpretative or procedural rules rather than legislative rules using APA notice-and-comment rulemaking procedures. This developing law on rulemaking, along with case law pertaining specifically to Medicaid program rules (discussed below) should provide some measure of comfort to HCFA in its rule and policy making activities.

Regarding interpretative rules and statements of policy, the Supreme Court's decision in Chevron U.S.A. v. Natural Resources Defense Council[322] is important. In this case, the Supreme Court outlined the analytic framework for judicial review of agency interpretations of statutes. Specifically, a reviewing court must give effect to congressional intent where a statute speaks directly to the precise question at issue, but, where a statute is unclear, a reviewing court must accept the agency's interpretation if it is reasonable and "based on a permissible construction of the statute."[323] It should be noted that the Administrative Conference of the United States has recommended that, in developing definitive interpretations of statutes, agencies should use rulemaking, formal adjudication or other procedures authorized by statute.[324]

In cases involving Medicaid regulations, the Supreme Court has been especially deferential to HCFA's interpretation of the Medicaid statute. In both Herweg v. Ray[325] and Schweiker v. Gray Panthers,[326] the Supreme Court upheld challenged Medicaid regulations in part because of an explicit delegation of authority in the Medicaid statute to interpret the statutory provisions in question. The Supreme Court has also recognized on several occasions that, because of the complexity of the Medicaid program, "Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Medicaid] Act."[327]

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[321] American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[322] 467 U.S. 837 (1984).

[323] *Id.* at 842-44. *See* Anthony, *Which Agency Interpretations Should Bind the Courts and the Public?*, 7 Yale J. on Reg. 1 (1990); Anthony, *Which Agency Interpretations Should Get Judicial Deference--A Preliminary Inquiry*, 40 Admin. L. Rev. 121 (1988).

[324] Admin. Conf. of U.S., Recommendation 89-5, "Achieving Judicial Acceptance of Agency Statutory Interpretations," 1 CFR §305.89-5 (1989).

[325] 455 U.S. 265, 274-75 (1982).

[326] 453 U.S. 34, 43-44 (1981).

In several recent decisions, the United States Court of Appeals for the District of Columbia Circuit has addressed the practical difficulty of distinguishing between legislative and interpretative or procedural rules.[328] Other federal courts of appeals, construing program instructions with detailed guidance for agency personnel on how to perform assigned responsibilities in broad statutory mandates, have come to view them as interpretative or procedural rules, or general statements of policies, even though the instructions contain matters not expressly suggested by the statutory language or impose new obligations on the public.[329]

Of particular interest is District of Columbia Circuit's decision in American Hospital Association v. Bowen.[330] This case involved Medicare manual directives and contracting procedures governing Peer Review Organizations and their review of the quality of care provided to Medicare beneficiaries in hospitals and other health care institutions. Many of the HCFA rules and policies at issue in this case are similar to Medicaid rules and policies. The District of Columbia Circuit concluded that the PRO program manual provisions and contracting procedures were either procedural rules or general statements of policy and, thus, exempt from §553 notice-and-comment rulemaking procedures. The court aptly articulated the development of the law with respect to procedural rules:

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[327] Atkins v. Rivera, 477 U.S. 154, 162 (1986) (quoting Gray Panthers v. Schweiker, 453 U.S. 34, 43 (1982), and Batterton v. Francis, 432 U.S. 416 (1977)). In several cases involving rules for entitlement programs under the Social Security Act, several courts have accorded rules legislative effect even though the agency has not used notice-and-comment rulemaking procedures to promulgate the rule. *See, e.g.*, U.S. v. Morton, 467 U.S. 822, 834, *reh. denied*, 468 U.S. 1226 (1984); Heckler v. Campbell, 461 U.S. 458, 466 (1983); Batterton v. Francis, 432 U.S. 416 (1977). *See* Saunders, *supra* note 319, at 354-56 & n. 53.

[328] *See, e.g.*, American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); Arrow Air, Inc. v. Dole, 784 F.2d 1118 (D.C. Cir. 1986); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); National Latino Media Coalition v. FCC, 816 F.2d 785 (D.C. Cir. 1987); Thomas v. State of N.Y., 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). *See generally* Admin. Conference of United States, Guide to Agency Rulemaking (2d 1990) [hereinafter Guide to Agency Rulemaking].

[329] *See e.g.*, United States v. Fitch Oil Co., 676 F.2d 673 (T.E.C.A. 1982) (involving audit policies); United States Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984) (involving the agency's published priorities for investigations); Southern Cal. Edison Co. v. FERC, 770 F.2d 779 (9th Cir. 1985) (involving procedures for approving rates); Mada-Luna v. Fitzpatrick, 813 F. 2d 1006 (9th Cir. 1987) (involving operating instructions of the Immigration and Naturalization Service directed at the parameters of agency decisionmaking). *See* Guide to Agency Rulemaking, *supra* note 328.

[330] 834 F.2d 1037 (D.C. Cir. 1987).

> Over time, our circuit in applying the §553 exemption for procedural rules has gradually shifted focus from asking whether a given procedure has a 'substantive impact' on parties ... to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior. The gradual move away from looking solely into the substantiality of the impact reflects a candid recognition that even unambiguously procedural measures affect parties to some degree.[331]

Finally, Cubanski v. Heckler[332] is an interesting decision that addressed the requirements of §553 with respect to the relationship of HCFA and the states in the Medicaid program. In a state plan amendment, California sought to establish a generous income standard for aged and disabled individuals for its medically needy program under a provision of HCFA's Regional Office Manual issued during the Carter administration.[333] In Cubanski, a compliance action brought during the Reagan administration, HCFA asserted that California's income standard rendered its Medicaid program out of compliance with Medicaid program requirements. HCFA argued that the manual instruction on which the California standard was based was not a legislative rule with which it had to comply.[334] The Ninth Circuit, however, concluded that the manual provision was legislative and, indeed, had been properly promulgated as a legislative rule under the APA even though conventional notice-and-comment rulemaking procedures with publication in the Federal Register had not been observed. Pointing out that APA procedural requirements are to protect the public's interest and not to "shelter the Secretary," the court concluded:

> This case does not involve a defectively promulgated regulation challenged by members of the public who claim that they were harmed by losing their right to participate in the administrative rulemaking process. On the contrary, the

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[331] 834 F.2d at 1047. *See* Guide to Agency Rulemaking, *supra* note 328.

[332] 781 F.2d 1421 (9th Cir. 1986), *vacated as moot sub. nom.*, Bowen v. Kizer, 485 U.S. 386 (1988). After the case had been briefed and argued, Congress mandated that HCFA approve the proposed California plan amendment retroactively to the date of its proposal. OBRA '86 §4106, 101 Stat. 1330-147.

[333] Health Care Fin. Admin., Regional Office Manual §2572-D (1983).

[334] *Cubanski*, 781 F.2d at 1427.

> State and Intervenors emphasize that they had full awareness of the promulgation and existence of ROM [Regional Office Manual] §2572-D.[335]

Because of the volume of rules and policy that HCFA must issue to manage the Medicaid program properly, and also to keep up with the congressionally-mandated program changes each year, HCFA must have rulemaking procedures that enable it to issue detailed guidance to states, providers and the public in a timely and expeditious manner. As a practical matter, HCFA must be able to issue much of this guidance without following APA notice-and-comment rulemaking procedures in every instance. HCFA can issue manual provisions almost immediately. However, for legislative rules, HCFA needs to obtain clearance from other offices within HHS, including the approval of the Secretary. The HHS clearance process can, and usually does, take months. Further, it is well known that APA notice-and-comment rulemaking takes several months in the best of circumstances and much longer for controversial rules.[336] In addition, subsequent review by the Office of Management and Budget can further delay promulgation of final rules.[337]

In those cases in which Congress has clearly indicated that some program changes are so necessary that they need immediate implementation, whether or not HCFA promulgates implementing regulations, it makes sense for Congress to identify these particular program changes and address the problems that HCFA faces in meeting APA procedural requirements in a short time frame. For these cases, Congress may want to consider waiving procedural requirements under Chapter V of the APA to facilitate a more orderly rule and policy making process. Further, as in the case of OBRA '87 nursing home reform, Congress could specify in greater detail the programmatic changes in the statute so that implementing regulations would not be needed immediately.

Congress has created an exemption from a sixty day notice-and-comment requirement in the Medicare statute for Medicare regulations pertaining to eligibility, scope of benefits, or payment of providers.[338] Such Medicare regulations are exempt where the statute specifically permits a regulation to be issued in interim final form or "otherwise with a shorter period for public comment" or where the statute "establishes a specific deadline for the implementation of a provision and the deadline is less 150 days after the date of enactment."[339] Passed as a technical amendment in OBRA '86, the purpose of this provision was ostensibly to facilitate rulemaking for the Medicare program in the face of a large volume of congressionally-mandated changes annually.[340] Finally, it should be noted that HCFA has used interim final rules with a comment period for making Medicaid rules.[341]

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[335] *Id.* at 1428.

[336] *See* Asimow, *Public Participation*, *supra* note 320, at 530 & 576.

[337] *See* Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533 (1989).

[338] 42 U.S.C. §1395hh(a) (1988).

In any event, Congress should consider giving HCFA, and states, more time to develop the requisite rules and policies for implementing congressionally-mandated changes. Even if HCFA need not promulgate regulations, states still have an extensive policy making process with which they must comply. Furthermore, additional time will ensure that states use procedures for public participation in their rule and policy making process. This approach would be especially desirable if HCFA does not use notice-and-comment rulemaking procedures. It would also be desirable in view of the fact that the major responsibility for dealing with beneficiaries and providers resides with the states in the Medicaid program.

Nevertheless, the risks of not using notice-and-comment rulemaking remain. Specifically, interpretative and procedural rules are still vulnerable to procedural challenges by rule opponents and subsequent invalidation by reviewing courts. More importantly, affected parties are not accorded a formal opportunity to participate in the rulemaking proceeding. They may be appropriately concerned that policy, particularly of a controversial nature, will be made in a secreted process in which they will have little or no input. This latter possibility poses a potentially serious problem for the Medicaid program in view of the fact that Medicaid beneficiaries are among the most vulnerable and unsophisticated people in American society.

To address these concerns, HCFA should observe the recommendation of the Administrative Conference of the United States regarding publication of interpretative rules and general statements of policy.[342] Concluding that it is difficult at best to distinguish between legislative rules and interpretative rules or policy statements, the Administrative Conference adopted a recommendation that agencies publish all interpretative rules and policy statements of general applicability before promulgation and, if not feasible, that they publish such rules and policy statements after adoption to permit public comment irrespective of the requirements of the APA.[343]

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[339] *Id.* at §1395hh(b).

[340] OBRA '87 §4035(b), 101 Stat. 1330-78. Further, Congress expressly exempted national coverage policy under the Medicare program from challenges alleging failure to comply with Chapter V of the APA, ostensibly on the ground that the agency's procedures for making these policies involved public input. 42 U.S.C. §1395ff(b)(3)(B) (1988). *See* H.R. Rep. No. 1012, 99th Cong., 2d Sess. (1986). It should be emphasized that the Administrative Conference of the United States expressly recommended that Congress consider repealing this exemption from APA procedural requirements for Medicare national coverage policy. Admin. Conf. of United States, Recommendation 87-8, National Coverage Determinations under the Medicare Program, 1 CFR §305.87-8 (1988). *See* Kinney, *National Coverage Policy Under the Medicare Program: Problems and Proposals for Change*, 32 St. Louis U. L. J. 869 (1988) [hereinafter, "Kinney, *National Coverage Policy*"].

[341] *See supra* notes 258-265 and accompanying text. *See also* Appendix A.

Negotiated rulemaking might also be used effectively in the Medicaid rule and policy making process in some instances. The basic concept of negotiated rulemaking is to convene the major interests affected by a proposed rule before the agency issues the proposed rule and to engage interested parties in a negotiation process that develops a consensus on an acceptable rule accommodating all legitimate concerns.[344] Under negotiated rulemaking, affected parties do not simply submit comments on a proposed rule but actually negotiate the contents of the draft rule with the agency in a dialogue directed by a mediator. The Administrative Conference has recommended the use of negotiated rulemaking as a means of avoiding protracted litigation that often follows informal rulemaking under §553 of the APA where parties have not been so intimately involved with the rulemaking process.[345] The Administrative Conference has also recommended use of negotiated rulemaking for national coverage determinations in the Medicare program.[346]

Although designed chiefly for legislative rulemaking, the negotiated rulemaking concept has much to offer HCFA for the Medicaid rule and policy making process.[347] HCFA could convene states, provider representatives and beneficiary advocates to negotiate the contents of HCFA rules and policies--particularly those of a complex nature that appear to be creating the problems outlined above. HCFA, as the major payer for Medicaid services, should also be an active participant in these negotiations rather than simply a facilitator, as is the customary role of agencies in other negotiated rulemaking proceedings.

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[342] Admin. Conf. of United States, Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5 (1988). *See* Asimow, *Public Participation, supra* note 320, at 578-584.

[343] 1 CFR §305.76-5 (1988).

[344] Breger, *Thoughts on Accountability and the Administrative Process*, 39 Admin. L. Rev. 399, 413 (1987). *See* Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo. L. J. 1625 (1986); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 Yale J. on Reg. 133 (1985); Popper, *An Administrative Law Perspective on Consensual Decisionmaking*, 35 Admin. L. Rev. 255 (1983); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1 (1982); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv. L. Rev. 1871 (1981).

[345] Admin. Conf. of United States, Recommendation 82-4, "Procedures for Negotiating Proposed Regulations," 1 CFR §305.82-4 (1987); Admin. Conf. of United States, Recommendation 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §305.85-5 (1987). *See* Harter, *supra* note 344.

[346] Admin. Conf. of United States, Recommendation 87-8, *National Coverage Determinations Under the Medicare Program*, 1 CFR §305.87-8 (1988). *See* Kinney, *National Coverage Policy, supra* note 340.

3. Impact of Delayed Medicaid Rule and Policy Making on States

HCFA's delays in making rules and policies to implement congressionally-mandated changes have had a serious impact on states. Even when Congress requires states to implement a statutory change without implementing regulations from HCFA, states still must amend their state plans, obtain approval of the state plan amendment from HCFA and also change their own rules and policies to implement the requisite program change.[348] Where Congress has imposed a tight statutory deadline for implementing a change, states, in some cases, are unable to utilize their customary state rulemaking procedures and often invoke emergency rulemaking procedures which generally truncate opportunities for public participation.

In many cases, HCFA issues implementing rules and policies just before the statutory deadline or even after the deadline has passed. Sometimes, HCFA does not issue rules or policy in any form, leaving the states to implement congressionally-mandated changes without any federal guidance at all. Further, HCFA has often not approved state plan amendments designed to implement changes and requested that states provide additional information thereby tolling the statutory deadline for approving state plan amendments.[349] States are then in the awkward position of being unable to comply with a congressional mandate because of HCFA's not having approved a state plan amendment. This situation is complicated by the fact that HCFA may subsequently reject their state plan amendments or promulgate inconsistent rules or policies which require changes in state implementation procedures.

States are also at financial risk if their rules and policies are inconsistent with federal requirements. Specifically, HCFA can bring a disallowance action to recover past federal payments.[350] Or claims paid on the basis of state policies can be viewed as errors for purposes of calculating the error rate penalty under the Medicaid quality control system.[351] In any event, HCFA's actions are programmatically disruptive to states programs, requiring additional changes in state programs that are already in flux.

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[347] *See* Stewart, *Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) (This author recommends a comparable negotiation for agency policies that are not promulgated as legislative rules). *See also* Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L. J. 525 (1972); Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 Cal. L. Rev. 886 (1975); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. Pa. L. Rev. 702 (1972).

[348] *See supra* notes 55-58 and accompanying text.

[349] *See supra* note 54 and accompanying text.

A good example of this problem with Medicaid rule and policy making is the implementation of legislation requiring state Medicaid programs to accord special treatment in payment rates to hospitals serving a disproportionate number of Medicaid beneficiaries. In OBRA '81, Congress mandated that payment rates meet the special needs of institutions serving a disproportionate share of the poor.[352] In COBRA, Congress ordered the Secretary of HHS to report back to Congress on the methodologies states use to address special needs of disproportionate share hospitals.[353] On reviewing this report, Congress found a "startling record of noncompliance" on the part of states and "indifference, if not hostility" on the part of HCFA and states regarding this requirement.[354]

In OBRA '87, Congress strengthened this requirement and specifically mandated that states develop a plan for paying more to qualified hospitals by July 1, 1988.[355] One month before the statutory deadline of May 1988 by which states had to have payment methodologies for disproportionate share hospitals in place, HCFA issued "interim manual" instructions advising states on how to implement the mandated changes.[356]

Despite this delay in publishing manual instructions, all states had complied with the July 1, 1988 deadline by submitting state plan amendments to conform to the new requirements or seeking an exemption because their current payment systems adequately compensated disproportionate share hospitals for their higher costs.[357] However, as of March 10, 1989--nine months after the statutory deadline for meeting the new legislative requirements--HCFA had approved the plan amendments of only 15 states.[358] Nevertheless, by February 1989, all but nine states were making the requisite payment adjustments to disproportionate share hospitals despite the fact that HCFA had not approved the state plan amendments of many states.[359] Medicaid directors reported that HCFA's approval of state plan amendments in this case took longer than usual and several recalled that HCFA had indicated that it would promulgate regulations "to clarify some of the more confusing or difficult-to-implement elements of the law."[360] On March 19, 1990, HCFA published an NPRM on Payment Adjustments for Hospitals that serve a disproportionate number of low income patients.[361]

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[350] *See supra* notes 70-72 and accompanying text.

[351] *See supra* notes 78-80 and accompanying text.

[352] OBRA '81 §2173, 95 Stat. 808-09 (codified at 42 U.S.C. §1396a(a)(13)(A) (1988)). This particular requirement has been litigated on several occasions. *See, e.g.*, SSM Healthcare System v. Reagen, 681 F. Supp. 625 (W.D. Mo. 1988); Bethany Med. Cent. v. Harder, 693 F. Supp. 968 (D. Kan. 1988).

[353] COBRA §9433, 100 Stat. 2067 (current version at 42 U.S.C. §1396a(h) (1988)).

[354] H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess., 525 (1987).

[355] OBRA '87 §4112, 101 Stat. 1330-148 to 1330-150 (codified as amended at 42 U.S.C. §1396a(a)(13)(A) (1988)). *See supra* note 151 and accompanying text.

[356] Health Care Fin. Admin., State Medicaid Manual §§6000.1-.5 (Interim Manual Instructions) Transmittal No. IM88-1 (1988) in 3 Medicare & Medicaid Guide (CCH) ¶14,725 (1990).

[357] D. Lipson, *supra* note 150, at 3.

This is not an isolated incident. For twenty-three statutory enactments since OBRA '87, HCFA has issued only 15 NPRMs and no final rules.[362] In eight of these statutory enactments, HCFA issued manual instructions in the same month or after the statutory deadline by which states had to implement the changes.[363] This kind of delay in getting out guidance to states clearly puts states in an awkward position given the kind of sanctions that HCFA can impose on states if they do not conform to federal requirements. It seems quite unfair to permit HCFA to impose sanctions on states if HCFA has not fully advised states of the program requirements with which they must comply. In an environment of short deadlines and limited resources, HCFA should not be permitted to penalize states that do develop policies as to how they will implement congressionally-mandated changes by the deadline.

In these instances, negotiated rulemaking convening representatives of states, such as the National Governors Association, the American Association of Public Welfare Attorneys, state Medicaid directors, as well as provider and beneficiary groups, might be quite useful. Specifically, these groups, with HCFA, could develop state plan amendments or manual provisions that could be used on an interim basis to implement a congressionally-mandated change in order to permit states to comply with set deadlines without risk of federal penalties as well as proceed with their own rule and policy making processes. Such a process would ensure input from affected parties in all aspects of the rulemaking process without some of the time delays associated with notice-and-comment rulemaking.

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[358] *Id.*

[359] *Id.* at 20.

[360] *Id.* at 29.

[361] Proposed Rule, Payment Adjustments for Hospitals that Serve a Disproportionate Number of Low Income Patients, 55 Fed. Reg. 10,077 (proposed Mar. 19, 1990).

[362] Letter to Congressman Henry A. Waxman, Chairman, Subcommittee on Health and the Environment, House Committee on Energy and Commerce from Administrator Gail R. Wilensky, Health Care Financing Administration (Sept. 7, 1990).

[363] *Id.*

V. Conclusions and Recommendations

The Medicaid program has the daunting assignment of paying for the medical care of many poor, including an increasing number of AIDS patients, in an era of escalating health care costs[364] and constrained federal and state budgets. Since the inception of the Medicaid program, Congress has sought to address particularly distressing situations with limited statutory amendments that deal with the immediate need at the lowest possible cost. The result is that the Medicaid program and its statutes, rules, and policies have become extremely and unduly complex, making the program difficult to administer for HCFA and the states.[365]

The complexity contributes to the current problems with Medicaid rule and policy making. Specifically, the exceptions and special situations in eligibility, benefits, coverage and payment are major reasons for the program's complexity. The Medicaid eligibility policies are especially complicated and doubtlessly unintelligible and bewildering for beneficiaries. Evidence that over 60 percent of the applications for Medicaid based on AFDC eligibility were denied in one year in seventeen states because of applicants' failure to comply with application procedures is extremely disturbing.[366] This evidence suggests that the Medicaid program's complexity is having a serious impact on potential and current beneficiaries. While it is beyond the mandate of this study to make recommendations suggesting basic changes in the design of the Medicaid program, it is appropriate to suggest that reexamination of Medicaid policy pertaining to eligibility, benefits, and coverage may be in order.

The problems with Medicaid rule and policy making since 1981 also stem in large part from a political tug of war between Congress and the Executive Branch about the scope and mission of the Medicaid program in terms of eligible groups as well as benefit and payment levels. The Executive Branch has been chiefly concerned with limiting federal financial commitment to the

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[364] Between 1987 and 1988 (the last year of reported data), national expenditures on health care increased 10.4 percent and comprised 11.1 percent of the Gross National Product. Off. of Nat'l Cost Estimates, *supra* note 6, at 1.

[365] Courts have acknowledged that the Medicaid statute is virtually incomprehensible. "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'" Friedman v. Berger, 547 F.2d 724, 727, n. 7 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977).

[366] *See supra* note 115 and accompanying text.

Medicaid program. Hounded by the federal budget deficit and the respective threats and opportunities posed by the Medicaid program budget in the effort to reduce the deficit, the Executive Branch has retained tight control of federal funds for the Medicaid program. This tight control is manifest in the large number of cost containment and quality control regulations HCFA has promulgated since 1981.[367] Like congressionally-mandated changes, these regulations also impose additional burdens on states as they adjust their own Medicaid programs to comply.

Compared to the Executive Branch, Congress clearly has a more expansive vision of the Medicaid program and is more inclined to exert federal control over policy on eligibility, benefits and their coverage and payment to providers. Further, Congress has been profoundly concerned about some of the distressing needs of poor infants, children and mothers in this country who suffered cutbacks in Medicaid eligibility and benefits during the early 1980s as well as the plight of the elderly and disabled poor in need of devastatingly expensive long term care.[368] Since 1981, Congress has addressed these problems as well as inequities and gaps in the Medicaid program by extending eligibility to new groups. Many of these legislative changes have endeavored to simplify policy for Medicaid eligibility, benefits and coverage, as well as to minimize differences in Medicaid program requirements across states.

However, the number and pace of these congressional mandates has clearly strained relations between HCFA and the states. Conceding the merit of the congressionally-mandated changes, they still usually require detailed instructions from HCFA for proper and coherent implementation by states. They also impose additional burdens on states that have the ultimate responsibility to serve Medicaid beneficiaries. States are understandably concerned about the federal management of the Medicaid program since 1981 and the onslaught of federally-generated program changes each year. In particular, they are concerned about increased Medicaid expenditures in their state budgets and the fact that federal mandates are not accompanied with adequate federal dollars for implementation.[369] A recent editorial in the Washington Post aptly described the concern of states about congressionally-mandated changes as well as the response of many in our society, including the editors of the Washington Post, to these concerns:

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[367] *See* Appendix A.

[368] *See supra* notes 27-37 and accompanying text. *See also Rom Champions Expansion of Medicaid*, Hospitals, Sept. 20, 1986, at 76.

[369] *Women, Children and Medicaid*, Wash. Post., Dec. 6, 1989, at A28; Hinds, *The Governors Talk About Taxing and Spending*, N.Y. Times, Oct. 28, 1990, at E5.

> The Governors have complained about these mandates, saying not without cause that Congress is unfairly spending the money that they are left to raise and sometimes distorting state priorities in the process. Others say that Congress is wrong to peck at the problem of the uninsured, and should await some comprehensive approach to the nation's health care problems. We ourselves have complained about the patchiness of the health legislative process in the past.
>
> But in this case, in merely expanding an established program into an area of need that most people think not only that it already does serve but that it should serve, Congress is right to put the pressure on the states and go ahead. Twenty percent of American children are poor, fewer than half of these are covered by Medicaid, and for them the intellectual and programmatic elegance of a comprehensive approach to health care will be a lifetime too late.[370]

HCFA is caught in the middle of this tug of war. It has responsibility for dealing with congressionally-mandated changes accompanied by short deadlines and sharp political disagreement over how these changes should be implemented. In general, HCFA has dealt with this situation admirably, endeavoring to serve the presidential administration while attempting to meet congressional demands. However, in many instances, HCFA and the Executive Branch have not been expeditious in implementing the legislative will through notice-and-comment rulemaking and other rule and policy making procedures. These delays and the perceived obstruction of the Executive Branch have motivated Congress to adopt legislative measures to ensure that HCFA and the Executive Branch do not thwart implementation of the law and in many cases, to correct HCFA interpretations of prior legislative mandates that are contrary to the intent of prior congressional mandates they are intended to implement.

Below are offered recommendations for procedural changes in the Medicaid program.[371] These recommendations are targeted chiefly to problems within the domain of administrative law and focus primarily on the promulgation and implementation of rules and policy for the Medicaid program in response to mandated program changes at the federal level.

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[370] *Id.*

[371] The recommendations were developed by the Committee on Rulemaking of the Administrative Conference of the United States on November 8, 1990.

A. Recommendations to HCFA

1. When Congress makes any changes to the Medicaid program, and in particular when it expands benefits, HCFA should act promptly to issue rules and policies implementing such changes. Insofar as resource constraints necessitate making choices about the priority in issuing rules and policies, priority should be given to program changes which Congress has identified for prompt implementation or where agency guidance is particularly necessary for their implementation.

2. Where HCFA finds it necessary to promulgate an interim final rule to implement Medicaid program changes, HCFA should permit a subsequent comment period and should avoid delays in publishing its response to the comments and any modification of the rule.[372]

3. HCFA should ensure that all rules and policies affecting the administration of the Medicaid program--whether promulgated pursuant to §553 of the APA or issued in the form of manuals, program memoranda, or letters to states--are readily available to the public at convenient locations.[373] HCFA should also quarterly publish an updated list of such materials in the Federal Register.[374]

4. (a) When Congress requires states to implement Medicaid program changes, HCFA should not penalize states in a disallowance action or impose an error rate penalty if the state has incurred greater Medicaid expenditures than a subsequently issued HCFA rule or policy would otherwise allow. This recommendation applies only where Congress mandates that states change their Medicaid programs with or without HCFA guidance, and where, in the absence of such guidance, a state

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[372] The Administrative Conference is currently undertaking a study of agency use of interim final rules.

[373] HCFA should devote greater attention to implementing its own salutary regulation in this regard, 42 CFR 431.18.

[374] *See* ACUS Recommendation 87-8, "National Coverage Determinations Under the Medicare Program," 1 CFR §305.87-8 (1987) and 89-1, "Peer Review and Sanctions in the Medicare Program," 1 CFR §305.89-1 (1989).

has submitted a state plan amendment reflecting a reasonable interpretation of the statute to implement the change.

(b) Where HCFA issues a final rule or provides other guidance resulting in a program change, it should provide a reasonable grace period (in which penalties are not imposed for noncompliance) to enable states to comply with the new HCFA requirements. This recommendation does not apply where the regulation or guidance, in essence, only tracks the statutory language. As a general matter, HCFA should avoid retroactive program changes.

B. Recommendations to Congress

1. Congress should reexamine the Medicaid program's daunting complexity with regard to eligibility, the scope of benefits, and payments to states and providers. This reexamination should seek ways to simplify and clarify these program areas, so far as practicable. Before enacting changes in the Medicaid program, Congress should consult with all parties (particularly HCFA and the states) knowledgeable about the complexities of implementing proposed program changes. Congress should avoid reliance on last-minute budget reconciliation negotiations to make major Medicaid program changes without having first obtained a clear understanding of how HCFA and the states can implement these changes.

2. Before establishing statutory deadlines for implementing legislative changes in the Medicaid program, Congress should consider whether such deadlines allow HCFA and the states adequate time to promulgate the requisite rules or policies and to take other necessary steps for their proper implementation. Where Congress mandates a complex program change to be implemented at the state level, it should allow states a reasonable period of time to engage in state rulemaking procedures before the change becomes effective.

APPENDIX A

Proposed and Final Regulations for the Medicaid Program Only Promulgated by the Health Care Financing Administration July 1981 to November 1990

Final Rules

1. Final Rule, Time Limit for States to File Claims, 46 Fed. Reg. 46,134 (Sept. 17, 1981), 42 CFR pt. 95 (1988)

2. Interim Final Rule with a Comment Period, Payment for Long term Care Facility Services and Inpatient Hospital Services, 46 Fed. Reg. 47,964 (Sept. 30, 1981), 42 CFR pt. 447 (1988)

3. Interim Final Rule with a Comment Period, Medicaid Eligibility and Coverage Criteria, 46 Fed. Reg. 47,976 (Sept. 30, 1981), 42 CFR pts. 435, 436, 440 and 441 (1988)

4. Interim Final Rule with a Comment Period, Reductions in Payments to the States, 46 Fed. Reg. 47,996 (Sept. 30, 1981), 42 CFR pt. 443, 45 CFR pt. 201 (1988)

5. Notice of Proposed Rulemaking, Offset Based on Third Party Liability Recoveries against Reductions in Medicaid Payments, 46 Fed. Reg. 48,006 (Sept. 30, 1981), 42 CFR pt. 433 (1988)

6. Interim Final Rule with a Comment Period, Freedom of Choice: Waivers of and Exceptions to State Plan Requirements, 46 Fed. Reg. 48,524 (Oct. 1, 1981), 42 CFR pts. 431 and 440 (1988)

7. Interim Final Rule with a Comment Period, Home and Community-Based Services, 46 Fed. Reg. 48,532 (Oct. 1, 1981), 42 CFR pts. 431, 435, 440 and 441 (1988)

8. Interim Final Rule with a Comment Period, Miscellaneous Medicaid Provisions--Increased State Flexibility, 46 Fed. Reg. 48,556 (Oct. 1, 1981), 42 CFR pts. 430, 433, 435, 441, 447 and 456 (1988)

9. Interim Final Rule with a Comment Period, Payment for Long term Care Facility Services and Inpatient Hospital Services, 46 Fed. Reg. 47,964 (Sept. 30, 1981), 42 CFR pt. 447 (1988)

10. Correction of Interim Final Rule, Public Notice of Changes in Method or Level of Reimbursement, 46 Fed. Reg. 58,677 (Dec. 3, 1981), corrected at 47 Fed. Reg. 8567 (Mar. 1, 1982), 42 CFR pt. 477 (1988)

11. Interim Final Rule with a Comment Period, State Residency for Institutionalized Individuals, 47 Fed. Reg. 27,076 (June 23, 1982), 42 CFR pts. 435 and 436 (1988) 12. Final Rule, Entitlement of Children for Whom Payments are Made Under the Foster Care Maintenance Payments Program or the Adoption Assistance Program, 47 Fed. Reg. 28,652 (July 1, 1982), 42 CFR pts. 431, 435 and 436 (1988)

13. Final Rule Correction, Miscellaneous Corrections, 47 Fed. Reg. 30,764 (July 15, 1982), 42 CFR pt. 435 (1988)

14. Correction of Interim Final Rule, Nurse-Midwife Services, Correction, 47 Fed. Reg. 31,878 (July 23, 1982), 42 CFR pt. 441 (1988)

15. Final Rule, Requirements Applicable to Sterilizations (Hysterectomies), 47 Fed. Reg. 33,695 (Aug. 4, 1982), 42 CFR pts. 50 and 441, 45 CFR pt. 96 (1988)

16. Final Rule, Expanded Phase-Out Provisions of Intermediate Care Facilities for the Mentally Retarded (ICF/MR) Correction Plans, 47 Fed. Reg. 37,547 (Aug. 26, 1982), 42 CFR pt. 442 (1988)

17. Final Rule, Reductions in Payments to the States, 47 Fed. Reg. 43,340 (Sept. 30, 1982), 42 CFR pt. 433 (1988)

18. Final Rule with a Comment Period, Liens, Adjustments, and Recoveries, 47 Fed. Reg. 43,644 (Oct. 1, 1982), 42 CFR pts. 443, 435 and 436 (1988)

19. Final Rule with a Comment Period, Imposition of Cost Sharing Charges under Medicaid, 48 Fed. Reg. 5730 (Feb. 8, 1983), 42 CFR pts. 431, 435, 436, 440 and 447 (1988)

20. Final Rule, Freedom of Choice; Waivers of and Exceptions to State Plan Requirements, 48 Fed. Reg. 23,212 (May 24, 1983), 42 CFR pt. 431 (1988)

21. Interim Final Rule with a Comment Period, Reduction in Error Rate Tolerance; Medicaid Quality Control Program, 48 Fed. Reg. 29,450 (June 24, 1983), 42 CFR pt. 431 (1988)

22. Final Rule, Interest on Disputed Medicaid Claims, 48 Fed. Reg. 29,480 (June 27, 1983), 42 CFR pt. 433 (1988)

23. Final Rule with a Comment Period, Deeming of Income Between Spouses; Categorically Needy, 48 Fed. Reg. 39,624 (Sept. 1, 1983), 42 CFR pts. 435 and 436 (1988)

24. Final Rule, State Medicaid Contracts, 48 Fed. Reg. 54,013 (Nov. 30, 1983), corrected at 48 Fed. Reg. 55,128 (Dec. 9, 1983), 42 CFR pts. 431, 434, 435 and 447 (1988)

25. Final Rule, Reduction in Error Rate Tolerance; Medicaid Quality Control Program, 48 Fed. Reg. 54,224 (Dec. 1, 1983), 42 CFR pt. 431 (1988)

26. Final Rule, Payment for Long term Care Facility Services and Inpatient Hospital Services, 48 Fed. Reg. 56,046 (Dec. 19, 1983), 42 CFR pt. 447 (1988)

27. Final Rule, Reduction in Error Rate Tolerance; Medicaid Quality Control Program, 49 Fed. Reg. 4740 (Feb. 8, 1984), 42 CFR pt. 431 (1988)

28. Final Rule, State Residency Requirements, 49 Fed. Reg. 13,526 (Apr. 5, 1984), 42 CFR pts. 435 and 436 (1988)

29. Final Rule Notice Concerning Collection of Information Requirements, OMB Approval of Forms for Reporting Quarterly Expenditures for Medical Assistance, 49 Fed. Reg. 29,795 (July 24, 1984), 42 CFR pt. 433 (1988)

30. Final Rule, Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Program, 49 Fed. Reg. 43,654 (Oct. 31, 1984), corrected at 49 Fed. Reg. 45,431 (Nov. 16, 1984), 42 CFR pts. 400 and 441 (1988)

31. Correction of Final Rule, Home and Community-Based Services, 50 Fed. Reg. 10,013 (Mar. 13, 1985), corrected at 50 Fed. Reg. 25,079 (June 17, 1985), 42 CFR pts. 435, 436, 440 and 441 (1988)

32. Final Rule, Federal Financial Participation for Inmates in Public Institutions and Individuals in an Institution for Mental Disease or Tuberculosis, 50 Fed. Reg. 13,196 (Apr. 3, 1985), corrected at 50 Fed. Reg. 38,811 (Sept. 25, 1985), 42 CFR pts. 435-436 (1988)

33. Final Rule, Claims Processing Assessment Systems (CPAS), 50 Fed. Reg. 21,839 (May 29, 1985), 42 CFR pt. 431 (1988)

34. Final Rule, Imposition of Cost Sharing Charges under Medicaid, 50 Fed. Reg. 23,009 (May 30, 1985), 42 CFR pts. 431 and 447 (1988)

35. Final Rule, Medicaid Management Information Systems; Conditions of Approval and Reapproval and Procedures for Reduction of Federal Financial Participation, 50 Fed. Reg. 30,838 (July 30, 1985), 42 CFR pts. 400 and 433 (1988)

36. Final Regulations, Third-Party Liability For Medical Assistance; FFP Rates for Skilled Professional Medical Personnel and Supporting Staff; and Sources of State Share of Financial Participation, 50 Fed. Reg. 46,652 (Nov. 12, 1985), 42 CFR pts. 432, 433, 435 and 436 (1988)

37. Final Rule, Eligibility to Severely Impaired Individuals Who Perform Substantial Gainful Activity, 50 Fed. Reg. 46,760 (Nov. 13, 1985), 20 CFR pt. 416; 42 CFR pt. 435 (1988)

38. Final Rule with a Comment Period, Treatment of Social Security Cost-of-Living Increase for Individuals who lose SSI Eligibility, 51 Fed. Reg. 12,325 (Apr. 10, 1986), 42 CFR pt. 435 (1988)

39. Final Rule, FireSafety Standards for ICFs/MR, 51 Fed. Reg. 13,224 (Apr. 18, 1986), 42 CFR pt. 442 (1988)

40. Final Rule, Third-Party Liability for Medical Assistance, Corrected at 51 Fed. Reg. 16,318 (May 2, 1986), 42 CFR pt. 433 (1988)

41. Final Rule, Mental Retardation; Definition of "Persons with Related Conditions," 51 Fed. Reg. 19,177 (May 28, 1986), 42 CFR pt. 435 (1988)

42. Final Rule, Adjustment of Federal Share for Uncashed or Cancelled (Voided) Checks, 51 Fed. Reg. 36,225 (Oct. 9, 1986), 42 CFR pts. 430 and 433; 45 CFR pt. 201 (1988)

43. Final Rule, Automatic Data Processing Equipment and Services; Conditions for Federal Financial Participation, 51 Fed. Reg. 45,321 (Dec. 18, 1986), 45 CFR pts. 95, 205 and 307; 42 CFR pt. 433 (1988)

44. Final Rule, Identification of Third-Party Liability Resources for Medical Assistance, 52 Fed. Reg. 5967 (Feb. 27, 1987), 42 CFR pts. 431, 433 and 435 (1988)

45. Final Rule with a Comment Period, Revisions to Medicaid Payments for Hospital and Long term Care Facility Services, 52 Fed. Reg. 28,141 (July 28, 1987), 42 CFR pts. 400 and 447 (1988)

46. Final Rule, Federal Financial Participation for Services of Long term Care Facilities, 52 Fed. Reg. 32,544 (Aug. 28, 1987), 42 CFR pts. 441 and 442 (1988)

47. Final Rule, Coverage of Qualified Pregnant Women and Children and Newborn Children, 52 Fed. Reg. 43,063 (Nov. 9, 1987), 42 CFR pts. 435 and 436 (1988)

48. Final Rule, Relations with Other Agencies, Miscellaneous Medicaid Definitions, Third-Party Liability Quality Control, and Limitations on Federal Funds for Abortions, 52 Fed. Reg. 47,926 (Dec. 17, 1987), 42 CFR pts. 431, 435, 440 and 441 (1988)

49. Final Rule, Withholding of Payments for Fraud or Willful Misrepresentation, 52 Fed. Reg. 48,814 (Dec. 28, 1987), 42 CFR pt. 455 (1988)

50. Final Rule, Automatic Data Processing Equipment and Services; Conditions for Federal Financial Participation, 53 Fed. Reg. 26 (Jan. 4, 1988), 45 CFR pt. 95 (1988)

51. Final Rule, End State Renal Disease Program; Responsibilities for Network Organizations, 53 Fed. Reg. 1617 (Jan. 21, 1988), 42 CFR pt. 405 (1988)

52. Final Rule, Corrections and Reduction Plans for Intermediate Care Facilities for the Mentally Retarded, 53 Fed. Reg. 1984 (Jan. 25, 1988), 42 CFR pt. 442 (1988)

53. Final Rule, Medicaid Program Payments to Institutions, 53 Fed. Reg. 3586 (Feb. 8, 1988), corrected at 53 Fed. Reg. 5344 (Feb. 23, 1988), 42 CFR pt. 435 (1988)

54. Final Rule, Conditions for Intermediate Care Facilities for the Mentally Retarded, 53 Fed. Reg. 20,448 (June 3, 1988), 42 CFR pts. 431, 435, 440, 442 and 483 (1988)

55. Final Rule, Appeals For Cancellation of Approval of Medicaid Long term Care Facilities, 53 Fed. Reg. 31,334 (Aug. 18, 1988), 42 CFR pt. 498 (1988)

56. Final Rule with a Comment Period, Requirements State Plans and Grants for States, 53 Fed. Reg. 36,569 (Sept. 21, 1988), 42 CFR pts. 400 and 430; 45 CFR pts. 201, 204, 205, 211, 212, 213, and 282 (1988)

57. Final Rule, Refunding of Federal Share of Overpayments Made to Medicaid Providers, 54 Fed. Reg. 5452 (Feb. 3, 1989) corrected at 54 Fed. Reg. 8435 (Feb. 28, 1989) (to be codified at 42 CFR pt. 433)

58. Interim Final Rule with a Comment Period, Targeting Information for Income and Eligibility Verification Systems, 54 Fed. Reg. 8738 (Mar. 2, 1989) (to be codified at 42 CFR pts. 433 and 435)

59. Final Rule with Technical Correction, Approved Information Collection Requirements and Federal Medical Percentage Computation, 54 Fed. Reg. 21,065 (May 16, 1989) (to be codified at 42 CFR pts. 400 and 433)

60. Final Rule with a Comment Period, Medicaid Management Information System: Revised Definition of "Mechanized Claims Processing and Information Retrieval System," 54 Fed. Reg. 41,966 (Oct. 13, 1989) (to be codified at 42 CFR pts. 433)

61. Final Rule, Eligibility Determinations Based on Disability, 54 Fed. Reg. 50,755 (Dec. 11, 1989) (to be codified at 42 CFR pts. 435 and 436)

62. Final Rule, State Plan Requirements and Other Provisions Relating to State Third Party Liability Programs, 55 Fed. Reg. 1423 (Jan. 16, 1990) (to be codified at 42 CFR pt. 433)

63. Final Rule, Medicaid Disability Determinations, 55 Fed. Reg. 290 (Dec. 11, 1989) (to be codified at 42 CFR Parts 435 and 436)

64. Final Rule, Membership Requirements and State Option for Disenrollment Restrictions for HMOs under Medicaid, 55 Fed. Reg. 23,738 (June 12, 1990) (to be codified at 42 CFR Parts 434 and 435)

Proposed Rules

1. Proposed Rule, Extended Phase Out Provisions of Intermediate Care Facilities for the Mentally Retarded (ICFs/MR) Correction Plans, 46 Fed. Reg. 42,698 (Aug. 24, 1981)

2. Proposed Rule, Revocation of Sixty-Day Public Notice of Changes in Method or Level of Reimbursement, 46 Fed. Reg. 45,964 (Sept. 16, 1981)

3. Proposed Rule, Offset Based on Third Party Liability Recoveries Against Reductions in Medicaid Payments, 46 Fed. Reg. 48,006 (Sept. 30, 1981)

4. Proposed Rule, Interest on Disputed Claims, 47 Fed. Reg. 29,275 (July 6, 1982)

5. Proposed Rule, Deeming of Income between Spouses; Categorically Needy, 47 Fed. Reg. 31,899 (July 23, 1982)

6. Proposed Rule, Contracts with Health Maintenance Organizations and Prepaid Health Plans, 47 Fed. Reg. 43,087 (Sept. 30, 1982)

7. Proposed Rule, State Residency Requirements, 47 Fed. Reg. 43,095 (Sept. 30, 1982)

8. Proposed Rule, Mental Retardation--Definition of "Persons with Related Conditions," 48 Fed. Reg. 7593 (Feb. 23, 1983)

9. Proposed Rule, Medicaid Management Information Systems: Conditions of Approval and Reapproval and Procedures for Reduction of Federal Financial Participation, 48 Fed. Reg. 9038 (Mar. 3, 1983)

10. Proposed Rule, Relation with Other Agencies and Miscellaneous Medicaid Definitions, 48 Fed. Reg. 10,378 (Mar. 11, 1983)

11. Proposed Rule, Federal Financial Participation for Inmates of in Public Institutions and Individuals in an Institution for Mental Disease or Tuberculosis, 48 Fed. Reg. 13,446 (Mar. 31, 1983)

12. Proposed Rule, Medicaid Overpayment Reporting Requirements, 48 Fed. Reg. 14,664 (Apr. 5, 1983), 42 CFR pt. 442

13. Proposed Rule, Claims Processing Assessment System, 48 Fed. Reg. 36,151 (Aug. 9, 1983), 42 CFR pt. 431

14. Proposed Rule, Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Program, 48 Fed. Reg. 38,011 (Aug. 22, 1983), 42 CFR pt. 441

15. Proposed Rule, Reduction in Eligibility Error Rate Tolerance Beginning October 1, 1983, Medicaid Quality Control Program, 48 Fed. Reg. 39,476 (Aug. 31, 1983), 42 CFR pt. 431

16. Proposed Rule, Deduction of Incurred Medical Expenses (Spend Down), 48 Fed. Reg. 39,959 (Sept. 2, 1983), 42 CFR pts. 435 and 436

17. Proposed Rule, Third-Party Liability for Medical Assistance; FFP Rates for Skilled Professional Medical Personnel and Supporting Staff; and Sources of State Share of Financial Participation, 49 Fed. Reg. 23,078 (June 4, 1984), 42 CFR pts. 432 and 433

18. Proposed Rule, Revisions to Medicaid Payment for Hospital and Long term Care Facility Services, 51 Fed. Reg. 5728 (Feb. 18, 1986), 42 CFR pt. 447

19. Proposed Rule, Payments to Institutions, 50 Fed. Reg. 10,992 (Mar. 19, 1985), 42 CFR pts. 435 and 436

20. Proposed Rule, Treatment of Social Security Cost of Living Increases for Individuals Who Lose SSI Eligibility, 50 Fed. Reg. 14,397 (Apr. 12, 1985), 42 CFR pt. 435

21. Proposed Rule, Income and Eligibility Verification, 50 Fed. Reg. 10,481 (Mar. 14, 1985), 42 CFR pts. 431 and 435

22. Proposed Rule, Adjustment for Federal Share of Uncashed or Cancelled (Voided) Checks, 50 Fed. Reg. 23,147 (May 31, 1985), 42 CFR pt. 430 and 45 CFR pt. 201

23. Proposed Rule, Federal Financial Participation for Services of Long term Care Facilities, 50 Fed. Reg. 42,192 (Oct. 18, 1985), 42 CFR pt. 442

24. Proposed Rule, Coverage of Qualified Pregnant Women and Children and Newborn Children, 50 Fed. Reg. 48,102 (Nov. 21, 1985), 42 CFR pts. 435 and 436

25. Proposed Rule, Fire Safety Standards for ICFs/MR, 50 Fed. Reg. 45,921 (Nov. 5, 1985), 42 CFR pt. 442

26. Proposed Rule, Revisions to Medicaid Payment for Hospital and Long term Care Facility Services, 51 Fed. Reg. 5728 (Feb. 18, 1986), 42 CFR pt. 447

27. Proposed Rule, Standards for Intermediate Care Facilities for the Mentally Retarded, 51 Fed. Reg. 7520 (Mar. 4, 1986), 42 CFR pts. 435 and 442

28. Proposed Rule, Identification of Third-Party Liability Resources for Medical Assistance, 51 Fed. Reg. 19,227 (May 28, 1986), 42 CFR pts. 431 and 433

29. Proposed Rule, Mandatory Second Surgical Opinion Requirements for Medicaid Recipients, 51 Fed. Reg. 21,933 (June 17, 1986), 42 CFR pt. 431

30. Proposed Rule, Correction and Reduction Plans for Intermediate Care Facilities for the Mentally Retarded, 51 Fed. Reg. 26,718 (July 25, 1986), 42 CFR pt. 442

31. Proposed Rule, Revision of Medicaid Eligibility Quality Control (MEQC) Program Requirements, 52 Fed. Reg. 2733 (Jan. 26, 1987), 42 CFR pt. 431

32. Proposed Rule, State Plan Requirements and Other Provisions Relating to State Third-Party Liability Programs, 52 Fed. Reg. 6350 (Mar. 3, 1987), 42 CFR pts. 433 and 447

33. Proposed Rule, Automatic Data Processing Equipment and Services; Conditions for Federal Financial Participation, 52 Fed. Reg. 35,454 (Sept. 21, 1987), 42 CFR pts. 95, 205 and 307

34. Proposed Rule, Eligibility Determinations Based on Disability, 52 Fed. Reg. 47,414 (Dec. 14, 1987), 42 CFR pts. 435 and 436

35. Proposed Rule, Refunding of Federal Share of Overpayments Made to Medicaid Providers, 52 Fed. Reg. 48,290 (Dec. 21, 1987), 42 CFR pt. 433

36. Proposed Rule, Waiver of Certain Membership Requirements for Certain Health Maintenance Organizations (HMOs), and State Option for Disenrollment Restrictions for Certain HMOs Under Medicaid, 53 Fed. Reg. 744 (Jan. 12, 1988), 42 CFR pts. 434 and 435

37. Proposed Rule, Eligibility of Qualified Severely Impaired Individuals Who Work, 53 Fed. Reg. 15,857 (May 4, 1988)

38. Proposed Rule, Home and Community-Based Services and Respiratory Care for Ventilator-Dependent Individuals, 53 Fed. Reg. 19,950 (June 1, 1988)

39. Proposed Rule, Coverage of Personal Care Services, 53 Fed. Reg. 24,103 (June 27, 1988)

40. Proposed Rule, Medicaid Management Information System: Revised Definition of "Mechanized Claims Processing and Information Retrieval System," 53 Fed. Reg. 30,317 (Aug. 11, 1988), corrected at 53 Fed. Reg. 31,801 (Aug. 19, 1988)

41. Proposed Rule, What is Not Income under SSI, 53 Fed. Reg. 32,252 (Aug. 24, 1988)

42. Proposed Rule, Modification of Certain Requirements for Health Insuring Organizations, 53 Fed. Reg. 32,406 (Aug. 25, 1988)

43. Proposed Rule, Eligibility of Aliens for Medicaid, 53 Fed. Reg. 38,032 (Sept. 29, 1988)

44. Proposed Rule, Eligibility Groups, Coverage and Conditions of Eligibility, Legislative Changes under OBRA '87, COBRA, and TEFRA, 54 Fed. Reg. 7798 (Feb. 23, 1989)

45. Proposed Rule, Eligibility and Coverage Requirements, 54 Fed. Reg. 39,421 (Sept. 26, 1989)

46. Proposed Rule, Limiting Donations and Taxes as State Medicaid Funding, 55 Fed. Reg. 4626 (Feb. 9, 1990), 42 CFR Part 433

APPENDIX B

Proposed and Final Rules for the Medicare and Medicaid Programs
Promulgated by the Health Care Financing Administration
July 1981 to November 1990

Final Rules

1. Final Rule, Reimbursement for Clinical Laboratory Services, 46 Fed. Reg. 42,669 (Aug. 24, 1981), 42 CFR pts. 405, 440 and 447 (1988)

2. Final Rule, Less Than Effective Drugs and Inpatient Hospital Tests, 46 Fed. Reg. 48,550 (Oct. 1, 1981), 42 CFR pts. 405 and 441 (1988)

3. Final Rule, Less Than Effective Drugs, 46 Fed. Reg. 53,664 (Oct. 30, 1981), 42 CFR pts. 405 and 441 (1988)

4. Final Rule, Correction, 46 Fed. Reg. 54,743 (Nov. 4, 1981), 42 CFR pts. 405, 431, 433, 435, 436, 440, 447, 456, 463, 466, and 478 (1988)

5. Final Rule, Less Than Effective Drugs, 47 Fed. Reg. 1386 (Jan. 13, 1982), 42 CFR pts. 405 and 441 (1988)

6. Final Rule, Continuation of Benefits and Eligibility for Certain Severely Impaired Recipients Who Work, 47 Fed. Reg. 15,319 (Apr. 9, 1982), 20 CFR pt. 416 (1988)

7. Final Rule, Less Than Effective Drugs, 47 Fed. Reg. 16,339 (Apr. 16, 1982), 42 CFR pts. 405 and 441 (1988)

8. Final Rule, Nurse-Midwife Services, 47 Fed. Reg. 21,046 (May 17, 1982), 42 CFR pts. 405, 435, 436, 440, 441 and 447 (1988)

9. Final Rule, Rural Hospitals: Provision of Long term Care Services (Swing-Bed Provision), Flexibility in Application of Standards, 47 Fed. Reg. 31,518 (July 20, 1982), 42 CFR pts. 405, 435, 440, 442 and 447 (1988)

10. Final Rule, Miscellaneous Amendments, 47 Fed. Reg. 47,388 (Oct. 26, 1982), 42 CFR pts. 405 and 442 (1988)

11. Final Rule, Suspension of Health Care Professionals for Conviction of Program-Related Crimes; Exclusion of Medicaid Providers for Fraud and Abuse, 48 Fed. Reg. 3742 (Jan. 27, 1983), 42 CFR pts. 420, 455 and 489 (1988)

12. Final Rule, Medicare, Medicaid, and Maternal and Child Health Services Block Grant Programs; Civil Money Penalties and Assessments for False or Improper Claims, 48 Fed. Reg. 38,827 (Aug. 26, 1983), 45 CFR pt. 101 (1988)

13. Final Rule, OMB Control Numbers for Collections of Information Contained in HCFA Regulations, 49 Fed. Reg. 4476 (Feb. 7, 1984), 42 CFR pt. 400 (1988)

14. Final Rule, Utilization and Quality Control Peer Review Organization (PRO): Assumption of Medicare Review Functions and Coordination With Medicaid, 50 Fed. Reg. 15,312 (Apr. 17, 1985), 42 CFR pts. 400, 405, 412, 431, 433, 456, 460, 462 and 466 (1988)

15. Final Rule, Withholding the Federal Share of Payments to Recover Medicare or Medicaid Overpayments, 50 Fed. Reg. 19,684 (May 10, 1985), 42 CFR pts. 400, 405 and 447 (1988)

16. Final Rule, OMB Control Numbers for Collections of Information Contained in HCFA Regulations, 50 Fed. Reg. 28,577 (July 15, 1985), 42 CFR pts. 400, 416 and 435 (1988)

17. Final Rule, Corrections and Conforming Changes, 50 Fed. Reg. 33,027 (Aug. 16, 1985), 20 CFR pt. 450, 42 CFR pts. 400, 405, 408, 409, 442, 456, 481, 485, 488 and 491 (1988)

18. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 51 Fed. Reg. 9792 (Mar. 21, 1986), 42 CFR pt. 400 (1988)

19. Final Rule, Payment for the Cost of Malpractice Insurance, 51 Fed. Reg. 11,142 (Apr. 11, 1986), 42 CFR pt. 405 (1988)

20. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 51 Fed. Reg. 11,581 (Apr. 4, 1986), 42 CFR pt. 400 (1988)

21. Final Rule, Conditions of Participation for Hospitals, 51 Fed. Reg. 22,010 (June 17, 1986), 42 CFR pts. 405, 412, 416, 417, 440, 441, 456, 482 and 489 (1988)

22. Final Rule, Miscellaneous Medicare and Medicaid Amendments, 51 Fed. Reg. 23,541 (June 30, 1986), 42 CFR pts. 405, 409 and 442 (1988)

23. Final Rule, Conditions of Participation for Hospitals; Corrections, 51 Fed. Reg. 27,847 (Aug. 4, 1986), 42 CFR pt. 405 and 482 (1988)

24. Final Rule, Program Integrity, 51 Fed. Reg. 34,786 (Sept. 30, 1986), 42 CFR pts. 412, 420, 455, 466, 474 and 489 (1988)

25. Final Rule, Establishment of Chapter V for OIG Regulations, 51 Fed. Reg. 34,764 (Sept. 30, 1986); 42 CFR ch. V, 45 CFR pt. 101 (1988)

26. Final Rule, Miscellaneous Conforming Amendments, 51 Fed. Reg. 41,332 (Nov. 14, 1986), 42 CFR pts. 405, 406, 408, 409, 410, 421, 431, 433, 435 and 489 (1988)

27. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 51 Fed. Reg. 44,987 (Dec. 16, 1986), 42 CFR pt. 400 (1988)

28. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 51 Fed. Reg. 44,986 (Dec. 16, 1986), 42 CFR pt. 400 (1988)

29. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 51 Fed. Reg. 44,985 (Dec. 16, 1986), 42 CFR pt. 400 (1988)

30. Final Rule, Payment for the Cost of Malpractice Insurance, 52 Fed. Reg. 9833 (Mar. 27, 1987), 42 CFR pt. 413 (1988)

31. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 52 Fed. Reg. 11,647 (Apr. 10, 1987), 42 CFR pts. 400 and 482 (1988)

32. Final Rule, Benefit Period Determinations, Drug Regimen Reviews and Other Technical Changes, 52 Fed. Reg. 22,638 (June 15, 1987), 42 CFR pts. 405, 409 and 442 (1988)

33. Final Rule, Limits on Payments for Drugs, 52 Fed. Reg. 28,648 (July 31, 1987), 42 CFR pts. 413, 430 and 447, 45 CFR pts. 1 and 19 (1988)

34. Final Rule, Redesignation of Rules Concerning Federal Requirements for Health Maintenance Organizations, 52 Fed. Reg. 36,746 (Sept. 30, 1987), 42 CFR pts. 110 and 417 (1988)

35. Final Rule, Entities Performing Quality of Care Review of Services Provided by Risk-Basis Health Maintenance Organizations and Competitive Medical Plans, 52 Fed. Reg. 37,454 (Oct. 7, 1987), 42 CFR pts. 466 and 476 (1988)

36. Final Rule, Organ Procurement Organizations and Organ Procurement Protocols, 53 Fed. Reg. 6526 (Mar. 1, 1988), CFR pts. 405, 413, 441, 482, 485 and 498 (1988)

37. Final Rule, Fire Safety Standards for Hospitals, Skilled Nursing Facilities, Hospices, Intermediate Care Facilities and Ambulatory Surgical Centers, 53 Fed. Reg. 11,504 (Apr. 7, 1988), 42 CFR pts. 405, 416, 418, 442 and 482 (1988)

38. Final Rule, Revisions in Reporting, Recordkeeping, and Other Requirements, 53 Fed. Reg. 12,010 (Apr. 12, 1988), 42 CFR pts. 405 and 434 (1988)

39. Final Rule, OMB Control Numbers for Collection of Information Requirements Contained in HCFA Regulations, 53 Fed. Reg. 16,267 (May 6, 1988), 42 CFR pt. 400 (1988)

40. Final Rule, Medicare, Medicaid, and Clinical Laboratories Improvement Act (CLIA) Patient Confidentiality Rules, 53 Fed. Reg. 48,645 (Dec. 2, 1988), 42 CFR pts. 74, 405 and 441 (1988)

41. Final Rule, Miscellaneous Medicare and Medicaid Amendments, 54 Fed. Reg. 4023 (Jan. 27, 1989), 42 CFR pts. 409, 410, 416, 421, 424, 441 and 489 (1988)

42. Final Rule, Approved Information Collection Requirements and Federal Medical Assistance Percentage Computation, 54 Fed. Reg. 21,065 (May 16, 1989), 42 CFR pts. 400 and 433 (1988)

43. Final Rule, Revisions of the Laboratory Regulations for the Medicare, Medicaid and Clinical Laboratories Improvement Act of 1967 Programs; Correction, 55 Fed. Reg. 33,907 (Aug. 20, 1990)

Proposed Rules

1. Proposed Rule, Prospective Reimbursement for Rural Health Clinic Services, 47 Fed. Reg. 54,113 (Dec. 1, 1982)

2. Proposed Rule, Medicare, Medicaid, and Maternal and Child Health Services Block Grant Programs; Civil Money Penalties and Assessments for False or Improper Claims, 47 Fed. Reg. 58,309 (Dec. 30, 1982)

3. Proposed Rule, Conditions of Participation for Hospitals, 48 Fed. Reg. 299 (Jan. 4, 1983)

4. Proposed Rule, Withholding the Federal Share of Payments To Recover Medicare or Medicaid Overpayments, 48 Fed. Reg. 6304 (Feb. 10, 1983)

5. Proposed Rule, Schedule of Limits on Home Health Agency Costs per Visit for Cost Reporting Periods Beginning on or After July 1, 1984, 49 Fed. Reg. 20,616 (May 15, 1984)

6. Proposed Rule, Schedule of Limits on Home Health Agency Costs per Visit for Cost Reporting Periods Beginning on or after July 1, 1984, 49 Fed. Reg. 21,375 (May 21, 1984)

7. Proposed Rule, Schedule of Limits on Home Health Agency Costs per Visit for Cost Reporting Periods Beginning on or After July 1, 1984, 49 Fed. Reg. 23,078 (June 4, 1984)

8. Proposed Rule, Utilization and Quality Control Peer Review Organization (PRO); Assumption of Responsibilites and Medicare Review Functions and Coordination of Medicaid With Peer Review Organization, 49 Fed. Reg. 29,026 (July 17, 1984)

9. Proposed Rule, Revisions in Reporting and Recordkeeping Requirements, 51 Fed. Reg. 6429 (Feb. 24, 1986)

10. Proposed Rule, Fraud and Abuse; Revisions to OIG's Sanction Authorities, 51 Fed. Reg. 24,857 (July 9, 1986)

11. Proposed Rule, Benefit Period Determinations, Drug Regimen Reviews and Other Technical Changes, 51 Fed. Reg. 17,997 (May 16, 1986)

12. Proposed Rule, Limits on Payments for Drugs, 51 Fed. Reg. 29,560 (Aug. 19, 1986)

13. Proposed Rule, Limits on Payments for Drugs; Extension of Comment Period, Availability of Data, and Clarification, 51 Fed. Reg. 33,086 (Sept. 18, 1986)

14. Proposed Rule, Fire Safety Standards for Hospitals, Skilled Nursing Facilities, Hospices, Intermediate Care Facilities and Ambulatory Surgical Centers, 52 Fed. Reg. 2430 (Jan. 22, 1987)

15. Proposed Rule, Organ Procurement Organizations and Organ Procurement Protocols, 52 Fed. Reg. 28,666 (July 31, 1987)

16. Proposed Rule, Revaluation of Assets, 52 Fed. Reg. 39,927 (Oct. 26, 1987)

17. Proposed Rule, Survey and Certification of Health Care Facilities, 52 Fed. Reg. 44,300 (Nov. 18, 1987)

18. Proposed Rule, Miscellaneous Medicare and Medicaid Amendments, 52 Fed. Reg. 48,127 (Dec. 18, 1987)

19. Proposed Rule, Changes to Peer Review Organizations Regulations, 53 Fed. Reg. 8654 (Mar. 16, 1988)

20. Proposed Rule, Medicare, Medicaid, and Clinical Laboratories Improvement Act (CLIA) Patient Confidentiality Rules, 53 Fed. Reg. 10,404 (Mar. 31, 1988)

21. Proposed Rule, Revisions to Conditions of Participation for Hospitals and Conditions for Coverage of Services of Independent Laboratories and Conditions for Coverage of Suppliers of End-Stage Renal Disease Services, 53 Fed. Reg. 22,506 (June 16, 1988)

22. Proposed Rule, Revision of the Clinical Laboratory Regulations for the Medicare, Medicaid, and Clinical Laboratories Improvement Act of 1967 Programs, 53 Fed. Reg. 29,590 (Aug. 5, 1988)

23. Proposed Rule, Denial of Payment for Substandard Quality Care and Review of Beneficiary Complaints, 54 Fed. Reg. 1956 (Jan. 18, 1989)

24. Proposed Rule, Medicare/Medicaid Programs; Fire Safety Standards for Hospitals, Long term Care Facilities, and Intermediate Care Facilities for the Mentally Retarded, 55 Fed. Reg. 31,196 (Aug. 1, 1990)

SELECTED CONSULTANT REPORT

To the Chevron Station: An Empirical Study of Federal Administrative Law

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

To the Chevron Station: An Empirical Study of Federal Administrative Law[*]

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[*] Appendixes to this report are available by request from the Conference.

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We begin with a puzzling fact. Although the study of administrative law began in earnest more than fifty years ago, we still know little about what is perhaps the central question in that field: how does judicial review actually affect agency decisionmaking? This question goes to the fundamental nature and quality of the modern administrative state, yet academic specialists have largely neglected it;[1] the subject remains a matter for uninformed speculation.[2]

Despite (or perhaps because of) the lack of data, however, strong opinions on this question are common. Our conversations and our reading persuade us that every self-respecting administrative lawyer has firm, if not always articulate or even consistent, convictions about the effect of judicial review upon agencies. Proof for this assertion abounds. Lawyers and their clients devote vast resources to challenging agency actions in the courts.[3] With Talmudic intensity, legions of legal scholars analyze the language and logic of judicial opinions in administrative law cases in their classrooms and professional journals.[4] Agencies themselves exhibit much concern about how reviewing courts respond to their handiwork. Manifestly, the "experts" act as if judicial review of agency action was worth fighting, writing, and worrying about. They believe, in short, that what courts say to agencies matters, and matters deeply.

But although there may be widespread agreement that judicial review of agency action matters, there is no consensus about precisely how and under what circumstances it matters. As Jerry Mashaw and David Harfst recently put it, "The normative expectations of administrative lawyers have seldom been subjected to empirical verification of a more than anecdotal sort."[5] And different observers evidently rely upon different anecdotes.

Most administrative law writers and teachers--and virtually all of them at one time or another--seek assiduously to expand and fine-tune judicial review of agency action, usually advocating a variety of institutional and doctrinal reforms for those purposes.[6] They suppose, at least by implication, that what courts do matters substantively--that when a court decides that an agency erred or failed adequately to support its action, the court's ruling actually (and not just normatively) controls the agency's subsequent behavior in that case. This behavioral supposition, after all, is one of the raisons d'etre of most of administrative law. The conventional explanation for judicial review of agency action is the need to confine agencies to their legal authority. To deny that courts actually perform this task is to raise dark and difficult questions about the compatibility of the administrative state with the rule of law.[7]

On the other hand, academic discussion of this question (sometimes by the very same writers) often proceeds as if the axiom of judicial control of agency action were empirically false.[8] Certain inexorable conditions, it is said, limit the capacity of reviewing courts to shape an agency's conduct. Pointing to factors such as the narrow "bite" of legal doctrine, the political context of administrative decisionmaking, judicial deference to agency expertise, the scope of agency discretion, an agency's control of its agenda, the limited resources of litigants, and the protracted nature of agency proceedings, these commentators emphasize that in practice if not in principle, an agency usually has the last word as well as the first.[9] Writing more than 20 years ago, political scientist Martin Shapiro crystallized this view in the statement that "the courts generally let the agencies do what they want."[10]

Which of these views is correct? We suspect that there is considerable truth in both of them--that judicial review "matters" in all cases (if only because review occasions delay and additional cost before the agency's action can be implemented), but that it has different effects depending upon a variety of factors. That much, of course, can be confidently asserted about virtually any legal phenomenon as complex as the interaction between courts and agencies. The more interesting and challenging questions are whether research is capable of identifying those factors and effects, discerning significant patterns in the relationship between them, and deriving systematic conclusions that can illuminate the ways in which reviewing courts actually shape agency behavior.

Believing that such a possibility must at least be entertained, we undertook a large-scale empirical study of how federal agency actions fare when they are directly reviewed by appellate courts. Although we were especially interested in the fate of cases that a reviewing court remands to the initiating agency for further proceedings, we anticipated that such a study could also be designed to generate data bearing upon a number of other important, albeit subsidiary, features of administrative law.

In the course of our study, we have come to appreciate all too well how problematic such research must inevitably be. The government does publish data on the number, type, and judicial disposition of the administrative cases that are appealed to the federal courts.[11] But those data, while useful, are too highly aggregated to answer most of the more refined questions that we hoped to answer. We were therefore obliged to gather our own data in ways that are described below in Part I.B., consoling ourselves with the conviction that on questions of this importance and interest, even imperfect information is better than perfect ignorance.

Our report is divided into three parts. In Part I, we describe our study design, organizing the discussion around our four principal goals and explaining the specific procedures that we used to pursue each of them.

We present our findings and analysis of the 1965, 1975, 1984-85, and 1988 data in Part II. We organize this discussion under four general headings. The first two of these headings emphasize certain changes that occurred in administrative law during the twenty years between 1965 and 1985. These changes relate to (1) the style of appellate court opinions, and (2) the outcomes and certain structural features of judicial review of agency cases (what we call the "ages of administrative law"). The third heading draws upon data gathered for 1984-85 and 1988. It focuses upon how the Supreme Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,*[12] affected the patterns of appellate court remands to agencies and considers whether those effects had dissipated by 1988, almost four years after *Chevron* was decided. The fourth heading analyzes what actually happens to remanded cases after they are returned to the agencies.

In Part III, we distill the major conclusions of our study. We begin by offering some observations about the strengths and limitations of our general methodological approach (which we call the "epidemiological study of caselaw") as a tool for identifying and understanding changes in the patterns of court decisions. We then summarize our principal findings.

I. Objectives and Study Design

We began our study with four principal objectives in mind. First, we hoped to describe the general parameters of judicial review of federal administrative action. While recognizing the diversity of agencies, agency actions, reviewing courts, and judicial dispositions of agency cases, we attempted to render that diversity manageable by focusing our attention upon some broad categories of information. For example, we wanted to establish the number of agency decisions that are reviewed by the courts of appeal; the proportion of those cases that are affirmed, reversed, and remanded by the courts; the frequency with which remanded cases are remanded for particular reasons; and the distribution of these variables among the different federal agencies and courts of appeals. At the same time, we hoped to shed light upon some ancillary, but potentially interesting attributes of judicial review of agency decisions, such as the length and footnoting of judicial opinions, the number of split decisions, the size of appellate panel, the type of agency proceeding being reviewed, and the frequency with which the courts applied different standards of review. To that end, we decided to read a large,[13] representative[14] sample of opinions in which federal courts of appeal engaged in direct review[15] of agency action.

Second, we hoped to reveal some of the dynamic patterns of administrative law by gathering these kinds of data for cases decided over a period of time that would bracket the two decades, 1965 to 1985, during which judicial review of agency action, by most accounts, experienced transformative conceptual and doctrinal changes.[16] We therefore decided to read opinions rendered during five discrete time periods. Four of them were 6-month periods: in 1965, just before that transformation is thought to have begun; in 1974-75, at a midway point during that 20-year period; in 1984, after the transformation would have concluded and just before *Chevron* was decided; and in 1985, after the Supreme Court reaffirmed and clarified *Chevron*. The fifth time period covered 2 months in early 1988, which was selected in order to learn whether the observed changes during the 1984-85 period had endured.

The 1984-85 period had the virtue of being close enough to the present to reflect the current state of administrative law (at least as revealed by our data), while also being distant enough from the present to facilitate our most important and most elusive objective: to reveal what actually happens when appellate courts remand cases to federal agencies for further proceedings. For this purpose, it was necessary that enough time had elapsed since the remand for the vast majority of remanded cases to have reached their conclusions so that we could analyze them as part of our data set.[17]

In order to learn what had transpired after the cases were remanded to the agencies, we conducted telephone (and occasionally personal) interviews with the lawyer who represented the agency and with the lawyer who represented the petitioner, in each of the roughly 180 cases during the 1984-85 period in which a court of appeal had remanded the case to the agency for further proceedings.[18] Those interviews were designed to elicit data bearing upon two "facts": the specific post-remand events (about which there was seldom much disagreement between the opposing lawyers), and the parties' evaluation of the outcomes (about which disagreement was more common) that could not always be resolved by attempting to integrate the lawyers' differing perceptions).[19]

Our final objective explains why we defined and divided the 1985 period precisely as we did. By doing so, we hoped to learn how the Court's *Chevron* decision, as clarified and reaffirmed eight months later in *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council*,[20] had affected appellate court review of agency action. While we discuss the changes in legal doctrine wrought by *Chevron* in more detail hereafter[21], for the moment it suffices to say that in *Chevron* the Supreme Court sent a strong signal to the courts of appeal that they should be more deferential in reviewing interpretations of statutes by administrative agencies.

Even before we initiated our study, *Chevron* had occasioned a great deal of published commentary, most of it viewing (and often denouncing) the decision as a watershed administrative law ruling that would encourage reviewing courts to defer to agency interpretations and policy directions, and thereby slow if not reverse the more intrusive patterns of judicial review that had gathered force during the preceding two decades.[22] For that reason, we read cases covering the six-month period preceding *Chevron* and the six-month period following *Chemical Manufacturers Ass'n*.[23]

For purposes of managing and analyzing our data set, we initially divided it into seven subsets of cases, each with its own computerized (Lotus 1-2-3) data file. These seven files were: (1) the 1965 cases (remand and nonremand),[24] which we called "65CASES;" (2) the 1974-75 cases (remand and nonremand),[25] which we called "75CASES;" (3) the 1984 nonremand cases (defined as those which an appellate court had disposed of without remanding them to the agency), which we called

"84CASES;" (4) the 1984 remand cases (defined as those which an appellate court had, in the first instance, remanded to the agency for further proceedings),[26] which we called "84REMAND;" (5) the 1985 nonremand cases, which we called "85CASES;" (6) the 1985 remand cases,[27] which we called "85REMAND;" and (7) the 1988 cases,[28] which we called "88CASES."

Then, to facilitate those analyses for which the distinctions between remand and nonremand cases or between pre*Chevron* and post-*Chevron* cases were not relevant, we aggregated the 1984 and 1985 cases by creating (8) a merged file of all 1984 cases, which we called "84MERGE;" (9) a merged file of all 1985 cases, which we called "85MERGE;" and (10) a file further combining these merged files, which we called "8485ALL." These ten files contained data that had been generated in two ways: by analyzing the published opinions (with respect to all 1965 and 1974-75 cases and the 1984-85 nonremand cases), and by that kind of opinion analysis plus subsequent telephone interviews (with respect to the 1984 and 1985 remand cases).[29]

The 1676 appellate cases that we analyzed for the 1984-85 period were generated in the first instance by almost 50 different administrative agencies.[30] Among other things, we hoped to learn whether different agencies generated different patterns of appellate review and handled remands differently. For two reasons, we found it useful to group the agencies for analytical purposes. First, relatively few agencies accounted for a high proportion of the cases studied while the great majority of agencies produced very few.[31] This meant that analyzing the agencies individually would often preclude statistically significant findings, while grouping them into larger clusters might avoid this problem. Second, we believed that certain groupings would help us to discern broad patterns that might otherwise remain obscured. Accordingly, we devised nine agency groups and allocated each agency in our data set to one of them.[32]

The case analyses, interviews, and data recordation were performed under our supervision from early 1987 to March 1989 by a group of law students at Georgetown and then at Yale, each of whom had completed a basic course in administrative law.[33] Once the data had been gathered, coded, and error corrected, they were entered into a computer and preliminarily analyzed.

Like all teachers and practitioners of administrative law, we did not come to the subject without preconceptions. Indeed, we began with a variety of beliefs, ranging from weak intuitions to firm convictions about what we would find. These beliefs formed the basis for a number of preliminary hypotheses concerning a range of administrative law phenomena that we hoped our data would illuminate. Most of these hypotheses--and certainly the more important ones from our point of view--relate to judicial remands. They concern, for example, how court size, agency type, proceeding type, and other such variables affect remands; how agencies respond to remands of various kinds; how long different administrative proceedings take to complete; and how these relationships have changed over time. Our data set, however, also enabled us to cast some light upon the evolution of certain other features of administrative law that are not specific to judicial remands, including the "style" of judicial opinions and some of the institutional structures within which administrative law is generated. When we discuss our findings and analysis in Part II, we shall briefly note these hypotheses and our reasons for initially viewing them as plausible.

Before proceeding to a discussion of the findings and analysis, we wish to emphasize what the earlier description of our methodology should have made clear: much of our data is in aggregated form. Although we have disaggregated it at many points--by agency, circuit, proceeding type, court size, time period, and disposition on appeal (itself broken down into several categories and subcategories), for example--our classification of the cases employs variables that can be gleaned from the face of the opinions themselves, from an analysis of the content of those opinions, or (in the case of the discussion of post-remand events) from information obtained from lawyers, some of which is undeniably impressionistic.

We are acutely aware that these variables do not capture all or even most of the factors that explain why reviewing courts and agencies decide as they do. The list of other factors that also powerfully shape their decisions would surely be a long one. It would certainly include factors such as the political environment in which the agency operates, the quality of the agency's personnel, lawyering, and other resources vis-a-vis those of private parties, the legal culture surrounding the agency, the respect in which it is held by litigants and reviewing courts, its technical competence, its statutory framework, and the like.[34]

Although such factors would unquestionably help one to predict and explain agency and reviewing court behavior, we do not discuss them much here because they are tangential to our purposes. Our intention has not been to analyze the behavior of particular agencies or reviewing courts (although we have devoted some attention to trends in the D.C. Circuit). Instead, our purposes have been to uncover broad patterns and general trends in administrative law and, with respect to our discussion of *Chevron*, to gauge how an unusually controversial administrative law decision of the Supreme Court has actually affected reviewing court (and indirectly, agency) behavior. Our data, we think, are fully appropriate to those goals.

II. Findings and Analysis

Our findings can usefully be analyzed under four rubrics, which organize the four sections in Part II. The first, which we call "the changing style of appellate opinions," considers how the way in which judges write their opinions has changed between 1965 and 1985. In particular, our data permit us to describe (a) the role of "table decisions;" (b) patterns relating to the length and footnoting of opinions; and (c) the fragmentation of reviewing court decisions through the filing of separate opinions. Our purposes in this section are not merely descriptive; the data also shed light upon various hypotheses about some larger themes and underlying trends in administrative law.

The second, which we call "the ages of administrative law," considers how certain structural and behavioral features of administrative law have changed between 1965 and 1985. These features include (a) the outcomes of judicial review; (b) the types of agency proceedings subject to judicial review; (c) the agency composition of the administrative law caseload in the circuit courts; (d) the size and distribution among circuit courts of that caseload; and (e) the composition of the reviewing courts.

The third, which we call "The Effects of *Chevron*," considers the patterns of reviewing courts' decisions to remand cases to the agencies. In particular, it (a) describes these patterns according to agency, circuit court, and type of remand; (b) analyzes whether and to what extent the Supreme Court's *Chevron* decision in 1984 affected the circuit courts' disposition of cases in general and their use of particular kinds of remands in particular; (c) discusses whether these effects persisted into 1988; and (d) analyzes the effects on particular agencies.

The fourth, which we call "What Happens After Remand," considers how agencies respond to remands and how those remands affect the outcome and duration of agency cases. The data that we present there are undeniably impressionistic and subjective. Nonetheless, we are aware of no other systematic effort to inquire into these obviously crucial questions.

A. The Changing Style of Appellate Opinions

Between 1965 and 1985, administrative law became more complex and technical. The number of administrative agencies and circuit courts proliferated. American society became more diverse and thus more difficult to regulate. Agency statutes imposed more detailed substantive and procedural requirements. Rulemaking joined adjudication as a prominent mode of agency decisionmaking. The records compiled in the agency proceedings became longer and more technical. An ethos of public participation led to the expansion of traditional judicial remedies against agencies and the creation of new ones. The sheer volume of cases rose substantially, necessitating more judges and burdening court dockets. This larger body of precedent settled relatively few issues; as is often true of judicial review, decisions tended to raise more questions than they answered.

Of all the changes in the landscape of administrative law over the past two decades, perhaps the most dramatic is the growing caseload. The number of administrative law cases decided on the merits by the federal courts of appeals has risen steadily, more than tripling over two decades, from 489 cases in 1965 to over 1567 cases in 1987. See Chart 1.

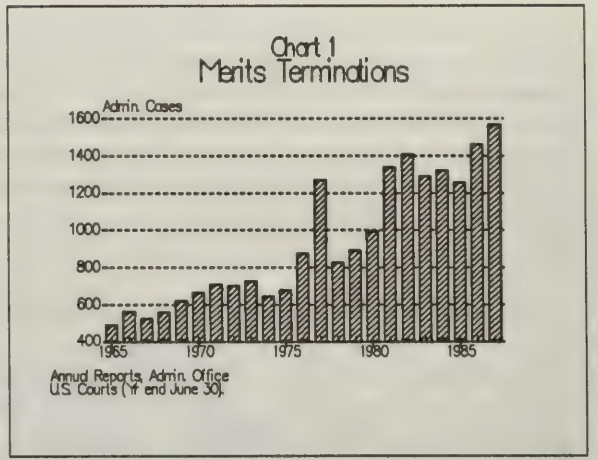


Chart 1
Merits Terminations

Annual Reports, Admin. Office
U.S. Courts (Yr end June 30).

The number of appeals from administrative action filed in the federal courts of appeals has grown by a similar proportion, also almost tripling between 1965 and 1985, from 1106 cases filed annually in 1965 to 3179 filings in 1985. See Chart 2. While the growth in the administrative caseload has indeed been dramatic, its effect should not be overstated. During the same period, the caseload of the courts of appeals in other areas was growing even more rapidly. Thus, despite substantial growth in absolute numbers, direct appeals from administrative action actually constitutes a much smaller percentage of the total business of the federal courts of appeals today than they did only two decades ago. Administrative appeals comprised only about 7 percent of filings in the courts of appeals in 1987, less than half of the 16 percent of the caseload that they accounted for in 1965. See Chart 2.

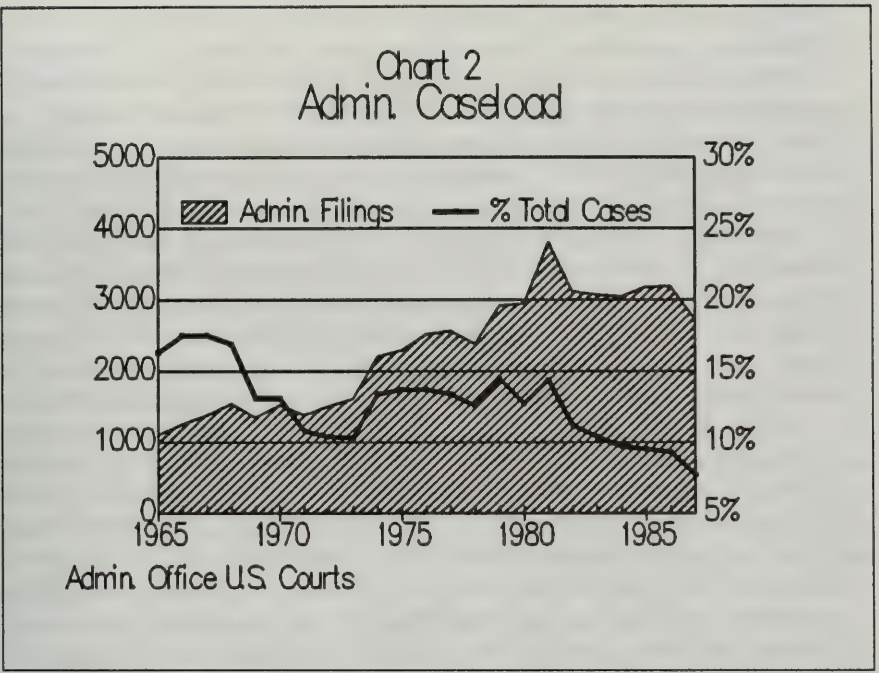


Chart 2
Admin. Caseload

Admin. Office U.S. Courts

In short, two trends moving in opposite directions are at work simultaneously. The total body of administrative law is increasing rapidly but administrative law appeals constitute a very small and ever shrinking portion of the workload of individual circuit judges. The combination of these two factors raises serious questions about the opportunity for appellate judges today to develop substantial experience in handling administrative law cases.[35]

These changes were bound to affect the ways in which appellate judges went about deciding agency cases. But it was not at all obvious precisely how they would adapt to the more complex disputes that increasingly arose before them. Some responses were readily predictable. Other things being equal, for example, busy judges needing to dispose of a larger caseload would probably employ more panel and fewer *en banc* decisions.

But other responses were less certain because the pressures for change sometimes pushed the courts in opposite directions. On the one hand, for example, one might suppose that judges pressed for time would feel constrained to write shorter opinions. On the other hand, one might also anticipate that more complex cases would make it more difficult for the judges to secure agreement among themselves and that their need to accommodate diverse views, coupled with the analytical demands posed by massive, technical administrative records, would lead them to write longer opinions, file more separate ones, and use more footnotes. The growth in the number of judicial clerks during this period might also encourage these developments.

We expected that these competing tendencies, and thus their uncertain resolution in the style of appellate court opinions, would be particularly strong in several situations: (1) in the District of Columbia Circuit, whose administrative law caseload is larger and is generally considered to be both more complex and more controversial than those of the other circuits;[36] (2) in rulemaking and ratemaking proceedings, which are usually more far-reaching than adjudications and generate more extensive, technical administrative records; (3) in *en banc* decisions, which involve more judges and tend to be reserved for the most important cases; and (4) in cases involving health, safety and environmental agencies, which also often generate extensive, technical records and are politically controversial. As we shall discuss in later parts of this section, our data bear out some of these expectations but not others.

1. Table Decisions

Even before beginning our analysis of the data, one development fairly leaped off the pages of the *Federal Reporter*. For many of the administrative law (and other) cases decided by the circuit courts, the Reporter publishes only "table decisions" containing minimal information: the names of the lead petitioner and respondent, the docket number, the date and disposition of the appellate court decision, and the forum (agency or court) from which the appeal was taken. Depending upon the local rules of particular circuits, the courts that issue these "table decisions" may or may not provide brief memoranda opinions to the parties. These memoranda are not published in the Reporter. Thus if one looks only at the information published in the table decision itself, one cannot learn either the nature of the dispute or the reasons supporting the disposition. The opaque character of these table decisions and the other effects of this practice have occasioned surprisingly little commentary during recent years when its use has grown fastest.[37] It is an important phenomenon raising fundamental questions about judicial practice and legal process.[38] These questions deserve detailed consideration, but most of them are outside the scope of this project.

During the period covered by our study, these table decisions have come to dominate the appellate courts' disposition of cases, including administrative law cases. The beginnings of the practice of disposing of appeals via unpublished orders or short, unpublished memoranda are somewhat murky. In 1964 the Judicial Conference of the United States formally endorsed it in a recommendation that the federal courts should authorize "the publication of only those opinions which are of general precedential value."[39] By 1965, a significant number of administrative law cases were probably being disposed of by unpublished order or opinion. Unfortunately, we have been unable to determine exactly how many unpublished dispositions occurred in 1965, since at that time no indication whatsoever was published in the *Federal Reporter* indicating that cases had been disposed of by unpublished order or memorandum. Between 1966 and 1974, each of the circuits promulgated a circuit publication plan, and in 1972 West began to publish tables in the *Federal Reporter* listing the cases that had been disposed of by unpublished order or memorandum, which we call "table decisions."[40] In 1974, the Judicial Conference approved the circuit publication plans, which were dissimilar in regard to both publication criteria and citation rules.[41]

The practice of disposing of cases through table decisions quickly caught on. In our 1975 sample of cases, almost 29% were table decisions. A decade later, 60% of our (much larger) sample were table decisions. See Chart 3. Indeed, the move toward using table decisions rather than published opinions to decide the bulk of the disputes that come before them may well have been the courts' major institutional response to their burgeoning caseload. This development also parallels (and presumably interacts with) a trend toward longer published opinions.

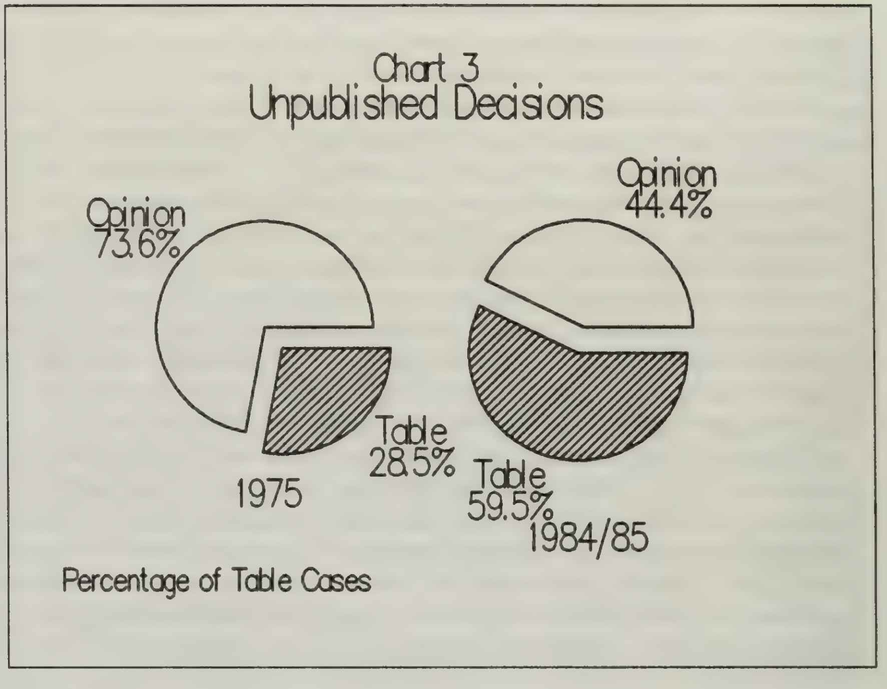


Chart 3
Unpublished Decisions
Opinion
73.6%
Table
28.5%
1975
Opinion
44.4%
Table
59.5%
1984/85
Percentage of Table Cases

Table 1, which follows, displays the differences in outcomes between published opinions and table cases:[42]

Table 1-Outcomes-Opinion vs. Table

1965

	Opinion #	%	**Table**				
Aff	205	55.1%	NA	Rev'd	107	28.8%	NA
Rem'd	51	13.7%	NA				
Other	10	.7%	NA				
Subtotal		373	100.3%				
Total		373	100.3%				
No. Cases		372					

1975

	Opinion #	%	**Table** #	%	**All** #	%
Affirmed	96	34.7%	72	26.0%	168	60.6%
Reversed	62	22.4%	4	1.4%	66	23.8%
Remanded	41	14.8%	1	0.4%	42	15.2%
Other	5	1.8%	2	0.7%	7	2.5%
Subtotal	204	73.6%	79	28.5%	283	
Total	283					102.17%
No. Cases					277	

1984+1985

	Opinion #	%	**Table** #	%	**All** #	%
Affirmed	402	24.0%	884	52.7%	1286	76.7%
Reversed	146	8.7%	37	2.2%	183	10.9%
Remanded	141	8.4%	52	3.1%	193	11.5%
Other	55	3.3%	24	1.4%	79	4.7%
Subtotal	744	44.4%	997	59.5%	1741	
Total	1741					103.88%
No. Cases					1676	

[File: ANAEDE12 (8-25-89) (4-7-89 data)].

For much of the analysis that follows, it turns out to matter a great deal whether table decisions are or are not included. Because table decisions provide no information as to the court's reasoning, we expected that the overwhelming majority of table decisions would be affirmances and that there would be virtually no reversals or remands.

We were wrong as to reversals and remands. By the 1984-85 period, courts' use of table decision dispositions had become so common that we found 37 table decisions reversing outright and 52 remanding to the agencies. These reversals constituted 3.7%, and remands constituted 5.2%, of the 997 table decisions contained in our data set. Together, these 89 cases represented 5.3% of all cases (opinions and tables) in our data set for that period. In our 1988 sample, 4.8% of all cases were reversals and remands taking the form of table decisions.

Because table decisions are used so frequently and are not confined to affirmances, we have felt constrained to analyze much of the data in two ways: including and excluding table decisions. In reporting the results, then, we shall make reference to the effect of table decisions on the variable being analyzed where the results appear to be differ significantly depending upon whether they are included or excluded.

2. The Length and Footnoting of Opinions

In order to test certain hypotheses about judicial opinion writing style, the complexity of administrative law issues, and the degree of reviewing court fragmentation, we decided to code each opinion according to its length and number of footnotes. We viewed these two variables as very crude[43] indices that were capable of revealing any trends toward greater judicial prolixity, issue complexity, documentation of evidence, and precedential significance that might exist. Because we believe that these issues are of only secondary interest, we have decided to report our conclusions in summary fashion here; we present a more complete discussion of the data in Appendix D.

In brief, we found that the District of Columbia Circuit writes longer, more heavily footnoted opinions than the other circuits do; that this disparity has increased since 1975; that the all-circuits average opinion was much shorter in 1985 than in 1975 if table decisions are included and about the same length if they are excluded; that rulemaking and ratemaking opinions are longer and more heavily footnoted than adjudication opinions; that (contrary to our expectation) law-based remands are generally shorter and less heavily footnoted than other kinds of remands; and that (again, contrary to our expectation) *en banc* decisions are shorter and less heavily footnoted than 3-judge court decisions; and that courts reviewing health, safety, and environmental agencies write longer, more heavily footnoted opinions than courts that review most other kinds of agencies.

c. The Fragmentation of Decisions

For several reasons, our data seemed especially useful for testing the "increased divisiveness" hypothesis. Many observers, most notably the Chief Judge of the D.C. Circuit herself, have commented on the pronounced ideological shift that occurred on that court after the confirmation of three "conservative" Reagan appointees in 1982 and 1983.[44] If these appointments affected outcomes, this effect might be captured by comparing our 1975 data set, which preceded the appointments, with our 1985 data set, which followed the last of them by several months.[45] More fundamentally, however, the divisiveness of a court may be defined in terms of its propensity to write separate opinions.[46] In measuring this propensity, we wished to avoid several potentially distorting effects of table decisions on our analysis,[47] yet we did not wish to exclude them from the analysis altogether. For if it is true that the more divided a court is the less likely it will be to issue table decisions, data on table decisions might enrich, rather than detract from, our analysis of divisiveness in different circuits and over time.

For similar reasons, we could not very well draw inferences about court divisiveness without considering the additional variable of court size. Simple logic strongly suggests that the number of judges who sit on a case is directly related to the number of opinions per case that will be written, and moreover that this would be true even if court size were not independently related to divisiveness (i.e.,, even if the most controversial cases were not the ones most likely to be heard *en banc*).[48] Our data confirm this relationship between the number of judges and the number of opinions per case; it was present in all periods and was especially strong in the most recent one.[49]

When we measure divisiveness (or its opposite, consensus) by the average number of opinions per case, we find (not surprisingly) that in all periods the more divisive the case is, the longer and more heavily footnoted the opinions are *in toto*.[50] When we analyze divisiveness nationally (that is, aggregating all circuits) and over time, and we exclude table decisions, we find that the proportion of one-opinion cases actually increased between 1965 and 1975 (from about 81% to 87%) and then remained at essentially the same level in 1984-85. Since table decisions are (almost by definition) unanimous and since their use has increased markedly over time, including them in the analysis would greatly strengthen this already discernible trend toward more consensus in the circuit courts, when those courts are viewed in the aggregate.

Viewing the D.C. Circuit alone does not really alter this conclusion; indeed, that court exhibits an even stronger trend toward greater consensus at least through the period covered by our 1984-85 data set. Excluding table decisions, the proportion of one-opinion decisions in the D.C. Circuit increased from about 70% in 1965 to over 75% in 1975 and then (unlike the circuits in the aggregate) further increased to almost 81% in 1984-85. When we take table decisions into account, the D.C. Circuit's consensus is greater: 86.5% of its decisions in the 1984-64 [sic] period involved only one opinion while 13.5% involved two or more opinions (three times the percentage in all other circuits viewed in the aggregate). This trend becomes even more striking because that court's share of the national total of table decisions, which because of their unanimity might be thought to inflate our consensus measure arbitrarily,[51] actually declined sharply between 1975 and 1984-85--from over 27% to under 7%.[52]

Thus, our data seem to refute the strong impression among commentators that "political polarity"[53] on the D.C. Circuit grew during the decade after 1975. It is true that consensus on that court has always been low relative to almost all other circuit courts; its consensus level was lower than the national average, which in the most recent period was over 86%, during all periods covered by our study.[54] And it is possible that its divisiveness did increase significantly after 1984-85, when additional Reagan appointees joined the court[55] and several older Democratic appointees holding senior status, including Chief Judge David Bazelon, died or retired. All we can say with some assurance is that this increased divisiveness, if any, was not observable in the 1984-85 cases.

B. The Ages of Administrative Law

1. The Outcomes of Judicial Review

Before this study began, we believed[56] (along with most other administrative lawyers, we suspect) that judicial review of administrative action was deferential in the 1960's, that it became more stringent during the "hard look" era in the 1970's, and has settled back to a moderately deferential stance during the 1980's. We also shared the common belief that these putative trends would be exhibited most conspicuously by the D.C. Circuit.

This picture of the "ages of administrative law" is now part of the shared professional culture of administrative lawyers.[57] It is one of our shibboleths, a conventional truth that knowledgeable lawyers repeat to one another and teach the next generation. One goal of our study was to explore whether this conventional picture of the changing nature of judicial review was accurate. We discovered that due to the distorting effect of table decisions it was difficult to form an accurate judgment about even so fundamental an issue as the likelihood that the courts would overturn administrative decisions on judicial review based on the public record of decisions published in the *Federal Reporter*. Our analysis of published decisions from 1965, 1975 and 1984-85 shows a consistent trend toward an increasing percentage of affirmances, as shown in Table 2, which follows:

Table 2-Outcomes - Chi Square Test

1965

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Affirmed	205	**55.1%**	258.16	10.95
Reversed	107	28.8%	55.40	48.07
Remanded	51	13.7%	44.50	0.95
Other	10	2.7%	14.94	1.63
Total	373	100.3%		
No. Cases	372			

1975

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Affirmed	168	**60.6%**	195.87	3.97
Reversed	66	23.8%	42.03	13.67
Remanded	42	15.2%	33.77	2.01
Other	7	2.5%	11.33	1.66
Total	283	102.2%		
No. Cases	277			

1984+85

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Affirmed	1286	**76.7%**	1204.97	5.45
Reversed	183	10.9%	258.57	22.09
Remanded	193	11.5%	207.73	1.04
Other	79	4.7%	69.73	1.23
Total	1741	103.9%		
No. Cases	1676			

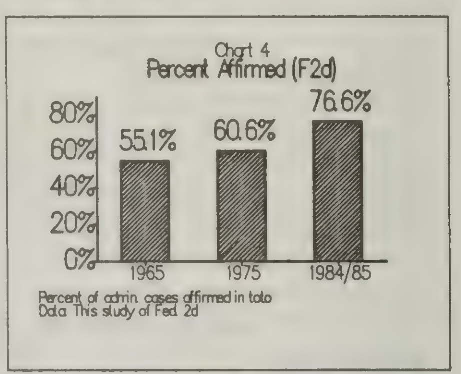
$X^2 =$ 112.71

[6 df: if $X^2 > 16.81$, $p < .01$]

[File: ANAEDE11 (8-25-89) (4-07-89 data)]

These results are statistically significant at well above the 99 percent confidence level using the Chi Square test for statistical significance. The results are shown graphically in Chart 4.

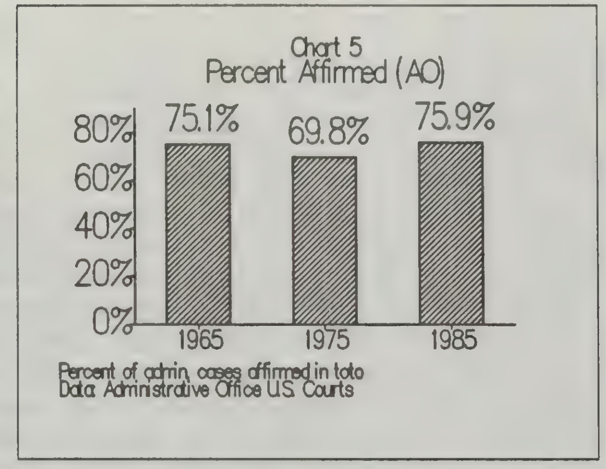
Chart 4 shows a long term trend toward increasing rates of affirmances by courts in administrative law cases, from 55.1 percent in 1965, to 60.6 percent in 1975, to 76.7 percent in 1984-85. There are corresponding decreases in the rates of reversals and remands. These data contradict the conventional wisdom, which would predict a higher rate of reversals and remands in 1975 than in 1965 or 1984-85.



Based on an analysis of the opinions published in the *Federal Reporter*, we were prepared to conclude that the conventional wisdom was wrong; according to our data, judicial review was not more stringent in the middle-1970's, at least if by "stringency" one means the propensity of the courts to reverse or remand rather than affirm. But data from the Administrative Office of the U.S. Courts (hereafter the "AO data") tell a different story than the data in Chart 4 generated by our analysis of the bound volumes.[58] Chart 5, on the following page, shows the AO data for terminations of administrative law cases in the courts of appeals after hearing or submission for the same years that we analyzed in Chart 4.

The largest disparity between these two datasets is for 1965. For 1965, we found only a 55% affirmance rate, whereas the AO data show a 75% affirmance rate. For 1975, our figures were much closer: we found a 61% affirmance rate; the AO had a 70% affirmance rate. For 1984-85, we were in almost total agreement: our affirmance rate was 76.6% percent; the AO's was 75.9%.

We think that these disparities largely reflect differences in the way that we and the AO defined and generated the datasets. We discuss these differences and their effects in Appendix E.



Strictly speaking, of course, the success rate of agencies in court says nothing about the "stringency" of judicial review. Outcomes in the reviewing courts are a function of (at least) two variables: how much courts are demanding, and how well agencies are conforming to the dictates of the law. It is possible that today's courts are much more demanding than their predecessors were in the 1960's and 1970's, but that agencies have improved their performance even faster. Thus, agencies may be "out ahead of the curve" of increasingly stringent judicial review.

There is probably some truth to this reading of the data. In some areas, the law today is undeniably more demanding than it was in 1965. An example is the Administrative Procedure Act's requirement that agencies provide notice and an opportunity for public comment before changing a rule.[59] In the 1960's, courts routinely upheld agency actions that were accompanied by short, vague notices in the *Federal Register*, although these notices were clearly inadequate to provide meaningful disclosure of the factual basis for the agency's action. No court in the 1980's would permit an agency to proceed without much more detailed disclosure of the underlying factual support for the agency's action, at least if a rule were being amended and there were no compelling necessity to dispense with the opportunity for public comment. At the same time, however, agency action is very rarely overturned in court today for failure to comply with the APA's notice and comment requirements. Although the rules are indeed more stringent today, they are also relatively clear and predictable, and agencies routinely comply with them. The courts have practically gone out of the business of imposing new procedural requirements on agencies.[60] Thus, there are fewer occasions today for courts to reverse or remand.

It appears, then, that it is not the absolute stringency of judicial review that translates into reversals and remands, but rather increasing marginal stringency. This occurs when courts are changing the law but agencies have not yet adapted their practices to the new regime. As the administrative state has matured, courts and the agencies have gotten to know one another better; the dictates of administrative law have become clearer; agencies have found it less difficult to satisfy reviewing courts, at least in the overwhelming body of their caseload that does not lie at the developing frontiers of the law.

The important point--on which our data and the AO data are in strong agreement--is that petitioners challenging administrative decisions in court today confront a very low probability of succeeding. This raises an interesting question: why do petitioners--who, as we shall see in the discussion of what happens after remand, are now facing an almost 90 percent chance of losing (either in their appeal or on remand)--continue to file challenges to administrative action in ever-increasing numbers? For ordinary civil litigation, there are strong reasons to believe that, other things being equal, plaintiffs and defendants should each win about half of the time when cases go to trial rather than settle.[61] That rule does not hold true in administrative law, since the agency wins almost 90 percent of the time, and challengers a little over 10 percent.[62]

One explanation, we believe, is that the party challenging administrative action often has a lot to gain and very little to lose from judicial review. In such cases it may be rational for affected parties to challenge administrative action in court even though they predict that their chances of prevailing today are substantially less than 50/50. The balance of costs and benefits from challenging agency action in court obviously varies from area to area. In deportation cases, for example, aliens who file a petition for review obtain an automatic stay of deportation forestalling it for months or even years. [63] Petitioners therefore "win" in an important sense whether or not the court ultimately rejects disposition of their legal claims. In labor cases, most NLRB orders cannot be enforced against an employer or union until a circuit court issues an order to that effect. Yet other agencies operate under different formal rules and practices concerning the time at which their orders become effective and the circumstances under which stays pending appeal can be obtained.

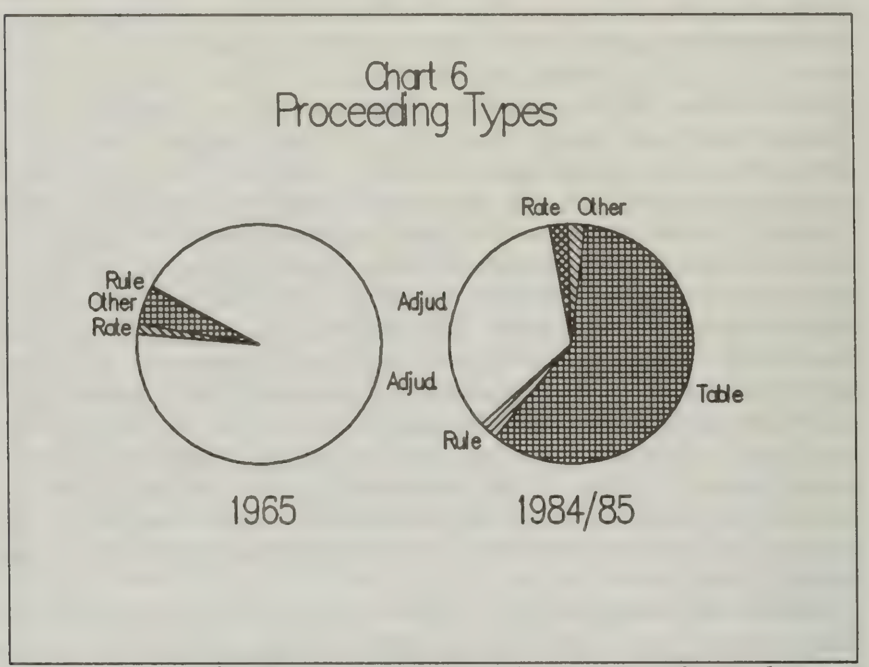
The delay associated with remands can be an additional incentive to appeal. Remands almost always occasion significant delay, as our data, discussed in Part II (4), make plain. Conservatively measured, this delay amounts to an average of 16 months at the agency level alone and more than 4 years in 10% of the cases.

Our data suggest still another explanation--that in general parties and their lawyers perceive the benefits from successfully challenging agency action in court as large and costs as small. While the percentage of petitioners who win remand or reversal of agency action in court is low, the lawyers for those who win believe that their clients have reaped large benefits in terms of actually changing the government's position. What is more surprising is that, by and large, the lawyers for the government concur. As we describe in more detail hereafter,[64] lawyers for petitioners and agencies agree that in approximately 40 percent of the cases that are remanded by courts, "major changes" in the agency's position result. Yet the costs that petitioners must incur in order to obtain these benefits seem quite modest. Since the agency initiates additional procedures looking toward a revision of the administrative record in only 30% of the remands, the additional legal cost of seeking judicial review of agency action in most cases appears to be relatively limited; presumably the petitioner's lawyers need do little more than revise for the appellate court the briefs already prepared and filed at the agency level.

Before we undertook the study, we thought that judicial review of administrative actions was probably a waste of time in a great many cases. We now believe that it may be rational for petitioners to challenge agency action in court even when they believe that the chances of success are low. The costs of a challenge are also relatively low, but the benefits can be very large if they can obtain a delay or if their challenge succeeds. Finally, the possibility that administrative lawyers are ignorant concerning the likelihood of success cannot be ruled out.[65]

2. Types of Agency Proceedings

In the 1965 period, more than 93% of the agency proceedings reviewed by the federal courts of appeals (347 out of 372) were adjudications. In 1975, adjudications' share had fallen to about 60% and by 1984-85 that share had dropped to about 34% or scarcely one-third. See Chart 6. But the magnitude of this change during the latter two periods is overstated because of the large increase in the proportion of table decisions that occurred then. Because we were unable to code these decisions as to proceeding type,[66] we excluded them from our analysis, yet we strongly suspect that they were disproportionately adjudications.[67]



When we confined our analysis to those proceedings that we could code as adjudications, rulemakings, or ratemakings, we still found that the share of adjudications declined, although much less dramatically--from about 98% in 1965 to about 87% in 1984-85. Limiting the sample in this way, the shares of rulemakings and ratemakings rose from 0.3% and 1.4%, respectively, in 1965 to about 7% and about 5% in 1975--a more than 20-fold increase in the case of rulemaking. These shares declined to 6.5% each in 1984-85. Even so, rulemaking's share remained more than 20 times larger in 1984-85 than it had been 20 years earlier, while ratemaking's share was more than four times larger.

The relatively low proportion of rulemakings even in the most recent period is somewhat surprising in light of the common perception that rulemaking has become a dominant form of agency decisionmaking during the 20-year period. Our data cannot directly prove or disprove that perception, for they concern not all agency proceedings but only those that are reviewed by courts of appeal. Thus, if a significant number of rulemakings occurred but were for some reason not appealed to those courts, the conventional view could still be correct. It is possible, for example, that the more deferential standard of statutory review often prescribed for rulemakings might discourage appeals. On the other hand, one would expect that rulemakings' more numerous parties and broader applicability and policy significance would increase, not decrease, the probability of appeals.

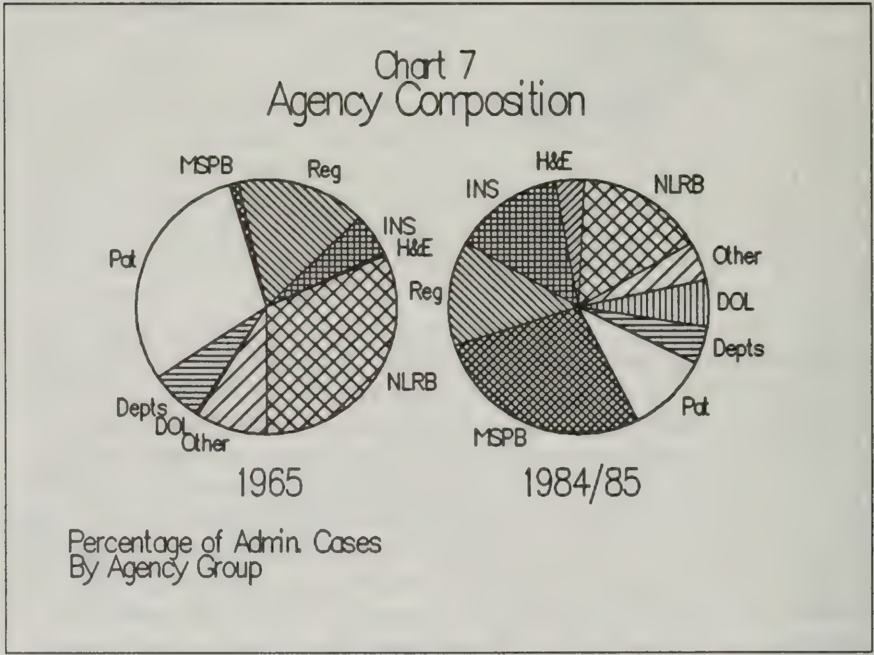
The use of aggregate data conceals some important clues about changes over time in agency use of rulemaking. Because the use of rulemaking, even today, is highly skewed across different agencies, changes in the agency composition of the caseload, which we discuss immediately below, might explain much of the aggregate use patterns. The three largest contributors to the appellate courts' current administrative law dockets--the NLRB, MSPB, and INS--are agencies which still engage almost exclusively in adjudication. Indeed our dataset, which spans twenty years and a large volume of cases, did not contain a single rulemaking proceeding by any of these three agencies. There were also no rulemakings in the much smaller number of Department of Labor and patent and trademarks cases in the dataset. Rulemaking is more prominent, however, in the other four agency groups, those that we called health and environment, other regulatory, other departments, and "other." In those agencies, rulemaking's share of all cases rose from under 1% in 1965 to 12.3% in 1975, only to fall to 9.4% in 1984-85.

This is an intriguing and important finding. It shows that the apparent decline in rulemaking between 1975 and 1984-85 does not simply reflect the rejection of rulemaking by the three large-volume agencies which dominate the administrative law docket, for it has also occurred in agencies that do use rulemaking. An important reason for this trend may be that reviewing courts between 1975 and 1985 increasingly constrained agency rulemaking by imposing adjudicatory-type evidentiary and procedural burdens on agencies engaged in rulemaking.[68] Whatever the cause of the reduction in the use being made of rulemaking, our data indicate that this phenomenon applies to a wide variety of agencies.

3. Review of Particular Agencies

The agency composition of the administrative law caseload has changed significantly during the 20-year period.

See Chart 7. In 1965, two agencies--the NLRB and the Patent and Trademark Office--dominated the picture, together accounting for over 61% of the caseload, split roughly equally between them. In the 1984-85 period, however, the NLRB's share dropped to just under 16% and the Patent and Trademark Office's to 6%.[69] On the other hand, the MSPB, which did not even exist until 1978,[70] now accounts for 27.5%, while immigration cases, which comprised only 5.4% of the caseload in 1965, now account for 13.7% and are the third largest group (after the NLRB and MSPB cases).



This more recent domination of the caseload by labor, personnel, and immigration cases also helps to explain why, as noted above, adjudication's share of the caseload has not changed significantly since 1965 despite the greater number of rulemaking proceedings in subsequent periods. The NLRB and the MSPB employ adjudication almost exclusively. Although the INS sometimes issues rules, its proceedings are overwhelmingly adjudications concerned with the exclusion, deportation, and adjustment of status of individuals.

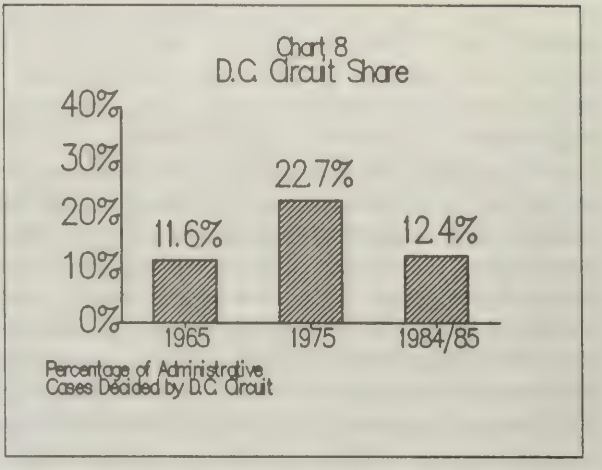
One unexpected finding concerns a change that has not occurred. Because "social regulation" seeking to protect health, safety and environmental interests has generated intense controversy and bitterly-fought litigation since the early 1970s, we had supposed that almost 15 years later, the circuit courts would be directly reviewing a large number of these disputes. In the 1984-85 period, however, such cases comprised only 3.6% of the caseload--larger than the 0.3% share in 1965, to be sure, but still insignificant in terms of the caseload as a whole.

4. Circuit Court Caseloads

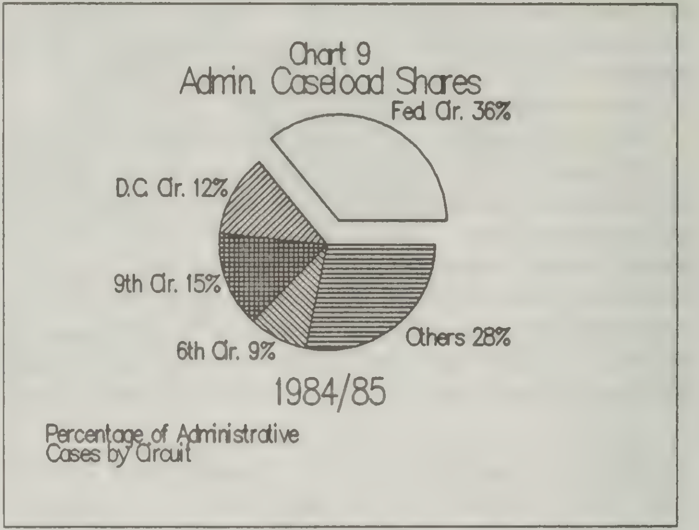
Our data concerning the administrative law caseload and its distribution among the circuit courts over the course of the two decades reveal some interesting and surprising patterns.

First, although the administrative law caseload of the appellate court system as a whole grew substantially between 1965 and 1985, the trajectory of that growth was by no means smooth. Here, we found a conflict between our data and that compiled by the Administrative Office of the United States Courts. Based on our 6-month samples, the caseload actually declined by over 25% between 1965 and 1975. In contrast, the AO data show an increase of 39% during this period.

Even allowing for the spasm of anti-regulation and regulatory reform sentiment during the Ford Administration,[71] the fact, not to speak of the magnitude, the decline shown by our data was quite unexpected. The 1975 period, after all, followed (and in some cases coincided with) the creation of a number of new regulatory agencies and an expansion in the regulatory programs and authorities of existing agencies.[72] Although we cannot fully account for this caseload decline between 1965 and 1975, we feel reasonably confident that it has no larger significance.[73]



Another interesting point that emerges from comparing data for 1965, 1975 and 1985 is that the District of Columbia Circuit's share of the total administrative law caseload remained essentially unchanged during the 20-year period; it was 11.6% in 1965 and 12.4% in 1984-85. Evidently, these data do mask some short-term fluctuations in the D.C. Circuit's "caseload share;" its share almost doubled in 1975, rising to 22.7%.[74] See Chart 8. Even so, however, this long-term stability is striking and puzzling, particularly during a period in which certain regulatory statutes sought to centralize appellate jurisdiction in that Circuit,[75] and in which administrative lawyers perceived a steady growth in its prominence and power.



Third, the busiest circuit by far in the most recent period was the Federal Circuit, whose caseload share was 36.4%, three times that of the D.C. Circuit and two and a half times that of its closest competitor, the 9th Circuit. See Chart 9. The Federal Circuit was established in 1981 and absorbed the jurisdictions of several existing tribunals. Two of these--the Court of Claims and the Court of Customs & Patent Appeals[76]--together had accounted for 44.3% of the cases in 1965 but only 18.4% in 1975. In addition, the Federal Circuit hears appeals from the MSPB, which as noted above now accounts for the largest number of cases of any agency in our data set.

5. The Composition of Reviewing Courts

The composition of reviewing courts in administrative law cases has changed over time. In 1965, more than 38% of the agency cases were reviewed *en banc*; the Court of Claims and the Court of Customs and Patent Appeals, which constituted almost half the administrative law caseload, almost always sat *en banc*.

By 1975, *en banc* cases had dropped to about 6%; as in 1965, all but one of them was in one of those two specialized courts. By 1985, *en banc* cases were 1.7% and one-third were in the Federal Circuit.[77] In 1965, 56.2% of the cases were decided by 3-judge panels, 38.4% were decided *en banc*, and the rest (5.4%) by panels of four or more judges but not *en banc*. It is not possible to compare the 1965 data to those for 1975 and 1984-85; as to those two periods, we must exclude table decisions because West's does not indicate the court's composition in such cases (although presumably they are almost all 3-judge panels). In 1975, the 3-judge panel share of nontable decisions was 86.9%, the share of *en banc* cases was 6.1%, and 7.1% were decided by a panel larger than three but less than *en banc*. In 1984-85, 3-judge panels accounted for almost 97% of the nontable decisions; *en banc* and larger panel cases were both negligible.

The rapid growth in the use of table decisions has already been noted, and the decline in the use of larger panels can probably be explained by efficiency considerations. But the rarity of *en banc* decisions in administrative law cases (only 12 out of the 688 nontable decisions--and presumably none of the 988 table decisions--in the 1984-85 period sample), especially outside the Federal Circuit, is striking.[78]

C. Remands and the Chevron Effect

1. The Pattern of Remands

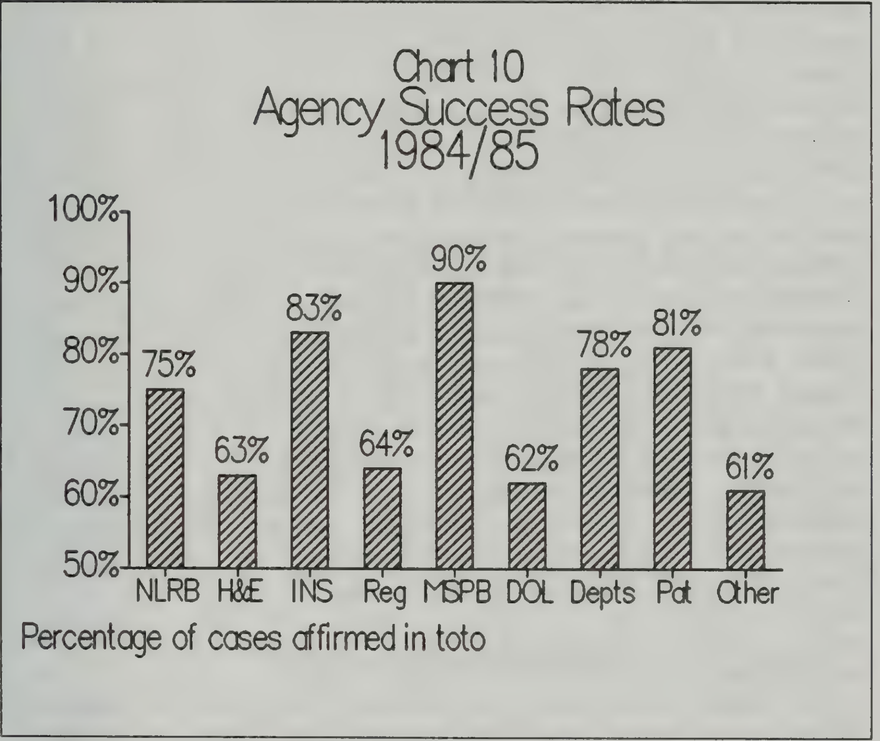
We were interested in two different aspects of remands in general,[79] each of which generated an initial set of hypotheses. One set only concerned remands occurring during the most recent period (1984-85), while the other was dynamic, being concerned with changes in the pattern of remands since 1965.

a. Remands During 1984-85

We began by supposing that the likelihood of each type of appellate outcome (i.e., affirmance, reversal, remands of different kinds, and "other"[80]) would not vary significantly among different agencies and among different circuits. Our thinking can be simply stated: we did not know of any specific reasons to expect systematic variations or of any widely accepted, well-specified theory of agency or appellate court behavior that would predict such variations. To be sure, fragmentary observations might be used to support certain predictions. For example, one might expect the NLRB, which engages only in adjudication, to suffer more reversals and remands than health, safety and environmental agencies that do more rulemaking, which is subjected (in principle) to a more deferential standard of review. One might also predict that the District of Columbia Circuit would reverse and remand more than the other circuits.[81] But for each of these theories, one could also propose a plausible counter-theory. None of them seems very satisfying.[82]

The data strongly refute our initial null hypothesis. Among different agencies (or at least among our agency groupings), the data reveal considerable variation in judicial review outcomes. Several general observations bear mentioning. First, a majority of the cases in all agency groupings were affirmed in toto. If we define such a disposition as an unambiguous agency "success," the precise success rate among some of the agency groupings varied a great deal. During 1984-85, the most successful was the MSPB (90%) while the least successful were the DOL and "other regulatory agency" groupings (about 60% each). See Chart 10.

Notice, however, that Chart 10 is characterized by a bi-modal distribution; there are two distinct groupings of agencies with different success rates in court. One grouping clusters around an 80% affirmance rate (INS, MSPB, Patent Office, Other Departments), while a second grouping clusters around a much lower, 60% affirmance rate (Health & Environment, Other Regulatory, Department of Labor, and Other). Our data strongly suggest that the disparity in success rates between the two groupings is related to the different types of proceedings through which they make their decisions. The group with the higher, 80% affirmance rate used adjudication in over 99% of their cases (332 of 335), while the group with the lower, 60% affirmance rate used adjudication in only 86% of their cases (236 of 275). If the agencies experiencing lower success rates were agencies that more frequently used rulemaking proceedings that might explain the disparity.



Again, our data provide some support for this interpretation. For the reported opinions in the 1984/85 dataset (excluding table cases which could not be coded as to proceeding type), the courts affirmed 60.4% of the adjudications in toto, while only 40.4% of the rulemakings were affirmed in toto. Moreover, this lower agency success rate for rulemaking as opposed to adjudication appears consistently over time. When the 1965, 1975 and 1984/85 data for reported opinions from all agencies are combined, a systematic difference in success rates emerges; adjudications have enjoyed a long term success rate of 57.8% (625 of 1082 cases) compared to only 43.9% (25 of 57) for rulemakings, a difference of almost 25%. And if we include table cases, which we believe are disproportionately adjudications and which we know are about 90% affirmances in the 1984-85 period, the success rates for adjudications would be even higher.

There are far too few rulemakings in our sample (only 2.5% in 1984-85) for the success rate disparities between adjudications and rulemakings to fully account for the differences in success rates among agency groupings observed in Chart 10. Rather, it is likely that the nature of the subject matter, which tends to correlate roughly with rulemaking as opposed to adjudication, may be the key factor in explaining the differences in agency success rates. Thus, our data suggest (though they certainly do not prove) that agencies may be less likely to be affirmed in situations that involve the kind of broad policy questions and multiple parties generally involved in rulemakings,[83] as opposed to the more confined processing of individual cases.

There are other possible explanations for these differences in agency success rates, explanations on which our data shed little light. It may be, for example, that the Federal Circuit, which reviews MSPB cases, defers more to that agency, perhaps because the personnel matters that it must decide turn more often on issues of credibility, about which the agency usually enjoys a comparative advantage. The variation in success rates among agencies, however, may reflect other factors such as different standards of review,[84] different incentives to litigate, different kinds of litigation adversaries, and so on.

b. Changes in Remand Patterns Since 1965

We began with several hypotheses concerning changes in remand activity over time. We expected that the share of agency cases remanded by the circuit courts taken as a whole would have increased between the 1965 and 1974-75 periods and then declined between the 1974-75 period and each of the subsequent periods. We also expected that this pattern would be especially pronounced in the District of Columbia Circuit. Finally, we expected that the share of remands involving rulemaking would have increased, and the share involving adjudication would have declined, during each succeeding time period.

2. The Effects of Chevron

The Supreme Court's *Chevron* decision, as clarified and reaffirmed in its *CMA* decision only 8 months later, was widely interpreted as a landmark ruling in administrative law.[85] In these rulings, most commentators agreed, the Court strongly signaled its intention that reviewing courts defer more to agency interpretations of their statutory authority.[86]

Chevron was not without precursors. At least since 1944, there had been a line of Supreme Court authority that reviewing courts should defer to agencies' constructions of their governing statutes so long as those constructions were "reasonable."[87] There was also a contrary line of cases, however, in which courts construed statutes for themselves, giving little or no deference to administrative interpretations.[88] The inconsistency between these two lines of cases did not escape the notice of the commentators.[89]

The confused state of the law prior to *Chevron* can be summed up by *SEC v. Sloan*,[90] a 1978 decision in which the Supreme Court overturned the SEC's interpretation of its statutory authority to suspend trading under Section 12(k) of the 1934 Securities Exchange Act.[91] The Court reviewed numerous factors that supposedly governed the extent of deference that courts owe to administrative constructions of statutes, such as whether the administrative interpretation is "of long standing"[92] and "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements."[93] The Court had to concede that the SEC's interpretation satisfied most, if not all, of these criteria. Nonetheless, the Court overturned the SEC's reading of the statutory language, concluding that it was "not the most natural or logical one."[94]

In *Chevron*, the Supreme Court swept aside all of these criteria for determining the extent of deference in favor of a dramatic reformulation of the grounds for deferring to agency constructions of statutes. An ambiguous statute, the Court reasoned in *Chevron*, should be considered an "implicit ... legislative delegation"[95] to the administrative agency of the discretion to decide which of several permissible interpretations of the statute to adopt. After *Chevron*, it no longer makes sense to speak, as the Court had itself spoken only a few years earlier in *SEC v. Sloan, supra*, of a statute administered by an agency as having a single "most natural or logical" meaning; if that were the issue, courts would presumably be at least as adept as agencies at discerning Congress' meaning. But in *Chevron*, the Supreme Court no longer conceptualizes the problem of statutory construction that way; rather than having a single, correct meaning on every point, an ambiguous statute is conceived as creating a policy space within which the agency is free to move, provided that its actions are reasonable and do not exceed the ambit of authority Congress has delegated to it.[96]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[97]

As the passages underscored above suggest, however, *Chevron* itself was not unambiguous. How clearly must Congress have spoken before its "intent" is binding on an agency? And how is a reviewing court to determine whether the agency's construction of the statute is "permissible" except by construing the statute for itself in the traditional way?

In the months immediately following *Chevron*, several court of appeals decisions attempted to cut *Chevron* down to size by reading the opinion as leaving substantial leeway for courts to find "implied intent" by Congress based on statutory language, overall statutory purpose or the legislative history.[98] In *Chemical*

Manufacturers Ass'n v. Natural Resources Defense Council,[99] decided only 8 months after *Chevron*, and several other decisions thereafter,[100] the Court reaffirmed its *Chevron* analysis. The *CMA* decision was particularly significant, for there the court of appeals had relied on explicit statutory language and legislative history in overturning the agency's construction of the statute. The Supreme Court reversed, citing *Chevron* and holding that the issue was for the agency because "the wording and legislative history of the statute . . . do not evince an unambiguous congressional intention to forbid" the course chosen by the agency.[101]

If the Court meant what it said in *Chevron* and its progeny, and if reviewing courts took its words seriously, one would expect the distribution of outcomes in agency cases to change to reflect the effects of *Chevron*. In particular, one would expect the courts to affirm more frequently and to remand less frequently. As Solicitor General Kenneth Starr (then a judge of the United States Court of Appeals for the District of Columbia Circuit) has observed, in *Chevron* "the Supreme Court invalidated what had been a rather common method of invalidating agency interpretations" of statutes.[102] A central goal of our study was to determine whether legal tremors of this magnitude, significant but subtle changes in legal doctrines, actually affect the subsequent behavior of the lower courts in reviewing administrative decisions. For a number of reasons, we did not share the expectation that outcomes would change after *Chevron*. By explaining our reasons, we hope to underscore the significance of what we did find.

To begin with, we have been educated and come to professional maturity in the shadow of the Legal Realist tradition. This tradition, which we share with most contemporary lawyers, emphasizes that legal rules are often indeterminate and malleable, and that this feature of law enables courts to exercise discretion in shaping their decisions. Courts, in the Realist view, choose according to a variety of considerations that are wholly extrinsic to the rules themselves, including the judges' policy preferences, their conceptions of institutional role, their theories of justice, craft norms, and the like.[103]

In general, we share this view and we believed that it was especially accurate as an account of how most courts review agency cases. Courts, after all, possess both the motivation and the institutional and doctrinal freedom to ride herd on agencies.

On the one hand, powerful structural and constitutional concerns drive courts in that direction. Agencies are armed with the coercive, redistributive power of the nation. They act under open-ended delegations of authority from Congress. They unify in appointed officials governmental functions that our constitutional scheme has sought to diffuse. If courts are suspicious of agency power, their mistrust only mirrors that of members of Congress and the general public.

On the other hand, the circumstances under which circuit courts operate strongly tempt them to intervene to review agency decisions. The standards and scope of judicial review are often broad and unconstraining. The records in administrative cases are often so extensive that reviewing courts can extract from them plausible grounds for either an affirmance or a remand. Congress not only legislates against a background practice of often close judicial review, but often reaffirms and relies upon that practice. On the other hand, the probability that the Supreme Court will review any particular decision by a circuit court is very low, and the probability that the Court will reverse it is even lower.

Appellate courts' close scrutiny of agency decisions, then, has been legitimated by basic constitutional values, fueled by deep institutional suspicions, and fortified by legal and strategic considerations. This practice is now deeply embedded in our system. Indeed, it is so firmly established that even Congress would find it exceedingly difficult to change the essential character of judicial review in agency cases.[104] In terms of the present inquiry, this observation raises two questions: How effective is the Supreme Court likely to be in actually getting the circuit courts to be more deferential to agency decisions? And given the fact that the Court plainly attempted to do just that in *Chevron*, has it succeeded?

The evidence concerning the effectiveness of Supreme Court decisions in altering the behavior of the lower courts is mixed: results seem to turn upon many factors, including how clearly defined the Court's normative requirement is, how workable it seems to be in practice, how costly it is for litigants to identify deviations from that norm, and whether the norm can be implemented only with the cooperation of extra-judicial actors, such as a bureaucracy.[105] These factors suggest that the Court's success in shaping lower court behavior will vary according to the area of law and policy domain in question.

However the question of the effectiveness of Supreme Court supervision may be answered generally, we are not entirely at sea when we seek to answer it in the particular context relevant to this study, administrative law. Two case studies of recent efforts by the Court to require reviewing courts to accord greater deference to agency decisions provide strong grounds for doubting the effectiveness of those efforts.[106]

These examples (and others) of the ability of reviewing courts to thwart the Supreme Court's demands for greater deference to agencies made us skeptical that its efforts to do so in *Chevron* and *CMA* would enjoy much success. Indeed, certain aspects of these decisions reinforced our doubts. First, the institutional role allocation policy underlying that instruction seemed problematic. [elaborate on this and other problems of a policy nature (ie, not the problem of doctrinal ambiguities, which is discussed immediately below. Here draw on Sunstein, others]

An additional reason for doubting the efficacy of the Court's instruction in *Chevron* grew out of the opinion itself. Despite the Court's determination, reaffirmed only 8 months later in *CMA*, to exact from reviewing courts greater deference to agency policymaking, the Court's language failed to instruct them with the unmistakable clarity and moral authority that at a minimum seem necessary (although they are not always sufficient) for the Court to alter the shape of court-agency relationships. Instead the opinion's language contained some important ambiguities and raised new and difficult questions.[107] These uncertainties enabled the circuit courts to adopt the strategy that they had pursued successfully in the wake of *Vermont Yankee* and *Wang*. They could affirm *Chevron*'s authoritativeness while retaining plenty of maneuvering room in the particularized application of its doctrine should they conclude that the agency's position was unjustified.[108] Thus, although we never imagined that the circuit courts would openly defy *Chevron*, we did expect that they would find it easy and often think it desirable to circumvent it. They began with powerful reasons, grounded in well-established constitutional values and institutional role conceptions, to resist a demand that they accord agency decisions more deference than those decisions warranted. To these motives for resistance the opinion's language added many opportunities for principled evasion. This combination of features, we predicted, would probably neutralize any significant behavioral effect of *Chevron*.

This expectation resonates with a larger controversy within the academy, one that extends well beyond administrative law to the very nature of all law. In recent years, scholars associated with the Critical Legal Studies movement have emphasized that legal doctrine is "indeterminate" in the sense that it does not constrain judges in their resolution of disputes. These "law skeptics" argue that because legal rules are "sufficiently ambiguous or internally contradictory to justify any result we can imagine," judges can use it to rationalize decisions reached on other, usually undisclosed grounds.[109]

This claim, law skeptics acknowledge, is at bottom an empirical one,[110] and it has implications that can be tested. At least in its strong form, the claim implies that doctrinal changes such as *Chevron* should have no effect upon the pattern of results reached in subsequent cases by lower courts provided that the judges' personal and political predilections remain essentially unchanged.[111] Since we drew our cases from two time periods that bracket *Chevron* and are separated from each other by less than a year, our dataset would seem to satisfy that proviso and permit us to test that implication of the law skeptics' claim.

The Outcomes Effect. We began by testing for what we call the "outcomes effect"--*Chevron*'s effect upon the distribution of appellate court outcomes. To do so, we analyzed the proportions of the total datasets of administrative cases that were affirmed, reversed, remanded or had some other disposition both before and after *Chevron*. The results of this analysis are presented in Tables 3 and 4 below:

Table 3-Distribution of Outcomes -Chi Square Test

1984

	Observed	**Percent**	**Expected**	**$(O-E)^2/E$**
Affirmed	523	70.9%	561.38	2.62
Reversed	106	14.4%	79.89	8.54
Remanded	106	14.4%	84.25	5.61
Other	25	3.4%	34.49	2.61
Total	760	102.98%		
No. Cases	738			

1985

	Observed	**Percent**	**Expected**	**$(O-E)^2/E$**
Affirmed	763	81.3%	724.62	2.03
Reversed	77	8.2%	103.11	6.61
Remanded	87	9.3%	108.75	4.35
Other	54	5.8%	44.51	2.02
Total	981	104.58%		
No. Cases	938			

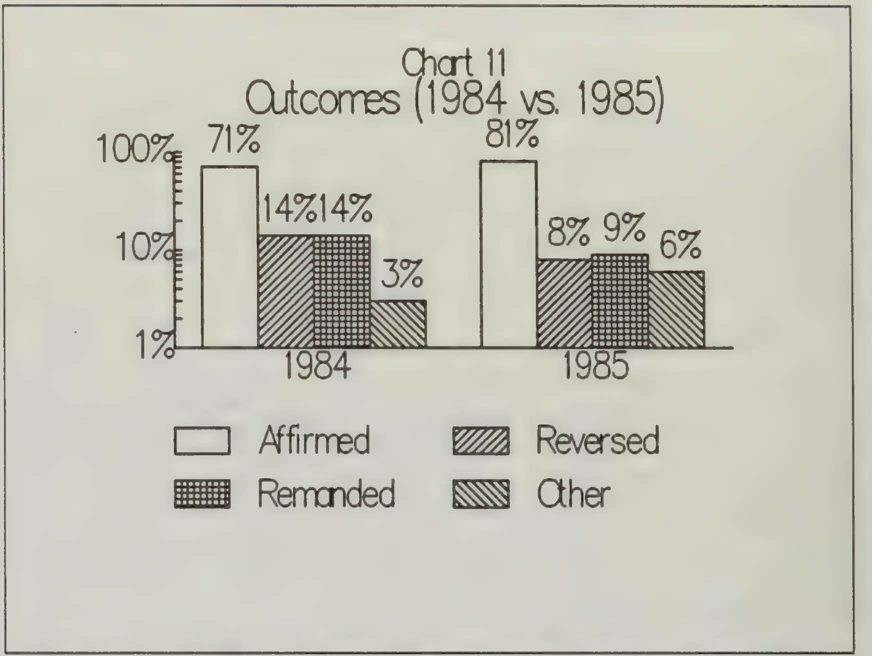
$X^2 =$ 34.40 [3 df: if $X^2 >$ 11.34, $p < .01$]

Table 4 - Change in Distribution of Outcomes 1984/1985

	Change	**% Chng (Abs.)**	**% Chng (Norm.)**
Affirmed	240	31.5%	14.8%
Reversed	-29	-37.7%	-42.8%
Remanded	-19	-21.8%	-35.4%
Other	29	53.7%	69.9%

[File: ANAEDE9 (8-24-89) (4-7-89 data)]

Table 3 shows a pronounced change in the appellate court dispositions of agency cases after *Chevron*. Remands, which constituted 14.4 percent of total dispositions in the 1984 dataset, dropped to 9.3 percent in 1985. This change, which is shown graphically in Chart 11, amounts to a 40 percent decrease in the frequency of remands (after normalizing for caseload growth between 1984 and 1985). See Table 4.



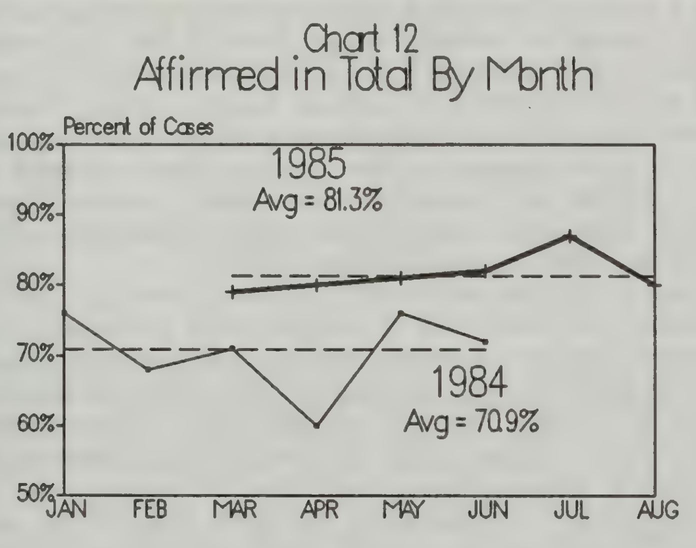
This striking finding led us to ask two additional questions. First, we wanted to know about what we call the "outcome displacement effect." Since there was a pronounced decrease in the proportion of cases remanded after *Chevron*, where did the "missing remands" go? Did they become affirmances, reversals, or something else? Second, we wanted to know about what we call the "reasons displacement effect." Of those remands that remained, what was the distribution of the different reasons for the remands--law, fact, or rationale--and how did that distribution of reasons compare to the pre*Chevron* distribution?

The Outcome Displacement Effect.

Returning to Table 3 above, it can be seen that not only do remands decrease, but reversals also decrease by a comparable amount, and affirmances increase. Between 1984 and 1985, affirmances *in toto* went from 70.9 percent of the cases to 81.3 percent. As shown in Table 4, more of the increase in the number of affirmances was attributable to a reduction in the number of reversals (down 29 cases), than to a reduction in the number of remands (19 fewer cases). This distribution is fully consistent with the logic of *Chevron*: although a court rarely, if ever, reverses on a ground other than an error of law, remands can more easily be justified on alternative grounds.

The differences in the distribution of outcomes in the 1984 and 1985 datasets are shown graphically in Chart 11.

A Chi Square (X^2) test for statistical significance is included in Table 3 above. It shows that the differences in the distributions of results between the 1984 and 1985 datasets are statistically significant at well above the 99 percent confidence level.



As a further way to assess our results we graphed the data on a month-by-month basis. See Chart 12. This shows remarkable consistency in the percentages of cases affirmed (as opposed to reversed or remanded) throughout both periods. In none of the six months that we studied during 1984 did the percentage of affirmances approach the level of affirmances for even the lowest month during 1985. This strongly suggests a systematic difference between the 1984 and 1985 datasets. Chart 12 also appears to exclude seasonal variation in the reporting of cases as a possible confounding factor.

The Reasons Displacement Effect

We have seen that our data on the outcomes effect refuted one major implication of the law skeptics' claim. Contrary to their prediction, *Chevron* significantly altered the proportion of agency cases affirmed by the appellate courts over a period of time during which judicial membership and preferences apparently were stable. Our data, however, enabled us to test another implication of their claim. On its face, the *Chevron* decision appeared to make it more difficult for a reviewing court to reverse or remand an administrative decision for an error of law in construing a statute.[112] If the skeptics were correct, then post-*Chevron* courts might try to maximize their residual power to remand by avoiding reliance upon substantive law-based remands (and reversals), the only type that *Chevron* had discouraged, and by relying instead upon remands on procedural, fact-based, rationale-based, or unstated grounds, to which *Chevron* did not expressly apply. We call this the "reasons displacement effect."

To learn whether the *Chevron* decision caused judges to alter the grounds on which they rationalized their decisions to remand, we coded all the reported cases remanding administrative decisions during a 6-month period in 1984 prior to *Chevron* and during a 6-month period in 1985 after *Chevron* into five categories:[113] (1) remands for errors of substantive law; (2) remands for errors of procedural law; (3) remands for lack of adequate factual support; (4) remands for lack of adequate explanation; and (5) remands for which no basis is given for the court's action (e.g., table decisions). As shown in Table 5, which follows, movement from reliance upon substantive law in favor of the other grounds for remand did occur after *Chevron*:

Table 5-Reasons for Remand

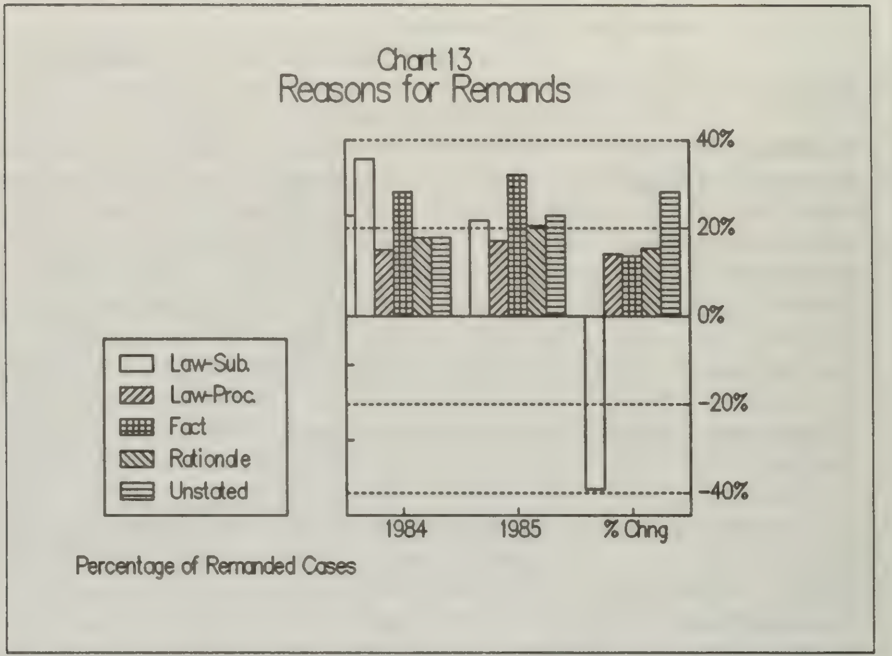
	1984		1985		84/85
	#	**%**	**#**	**%**	**% Chng (*)**
Law-Substance	38	35.8%	19	21.8%	**-39.1%**
Law-Procedure	16	15.1%	15	17.2%	14.2%
Fact-Based	30	28.3%	28	32.2%	13.7%
Rationale	19	17.9%	18	20.7%	15.4%
Unstated	19	17.9%	20	23.0%	28.3%
Total	122	115.1%	100	114.9%	
No. Cases	106		87		

*

Normalized

[File: ANAEDE10 (8-25-89) (4-27-89 data)]

As can be seen from the percentage change ("% Chng") column in Table 5, there is a pronounced (39 percent) decrease in the proportion of remands that rely on errors of substantive law as a reason for remand. While the other grounds for remand, including the absence of a stated reason, increased their percentage shares of the total, the actual numbers of cases in these categories remained remarkably constant. Thus, there was virtually no change in the total number of remands for procedural errors between 1984 and 1985, but the percentage increased due to the smaller total number of remands in 1985. The distribution of reasons for remands and the percentage changes in reasons for remands between the 1984 and 1985 dataset are shown graphically in Chart 13.



To determine whether these changes in the reasons for remands are statistically significant, a Chi Square (X^2) test was performed. As shown in Table 6, the comparison is not statistically significant with respect to the variation in the distribution of reasons for remands as a whole.

Table 6-Reasons for Remand-Chi Square Test

1984

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Law-Substance	38	35.8%	31.32	1.42
Law-Procedure	16	15.1%	17.04	0.06
Fact-based	30	28.3%	31.87	0.11
Rationale	19	17.9%	20.33	0.09
Unstated	19	17.9%	21.43	0.28
Total	122	115.1%		
No. Cases	106			

1985

	Observed	Percent	Expected	(O-E)2/E
Law-Substance	19	21.8%	25.68	1.74
Law-Procedure	15	17.2%	13.96	0.08
Fact-based	28	32.2%	26.13	0.13
Rationale	18	20.7%	16.67	0.11
Unstated	20	23.0%	17.57	0.34
Total	100	114.9%		
No. Cases	87			

X^2 = 3.74
[4 df: if X^2 > 3.36, p < .50]

However, when the contingency table was restructured to compare remands based on substantive law versus all other reasons, this comparison was found to be statistically significant at above the 95 percent confidence level. See Table 7.

Table 7-Reasons for Remand - Chi Square Test

1984

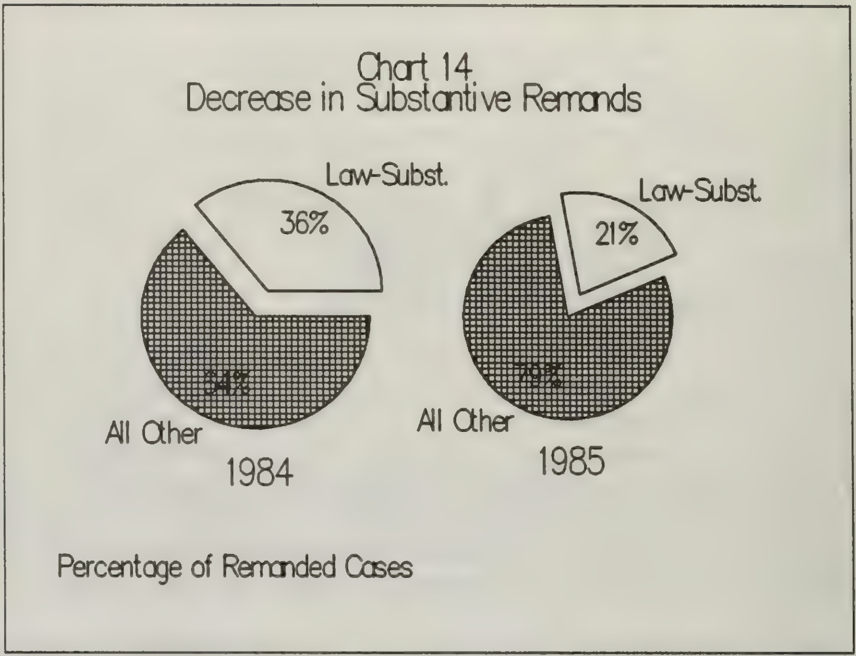
	Observed	**Percent**	**Expected**	**(O-E-.5)^2/E**
Law-Substance	38	31.1%	31.32	1.22
Other	68	55.7%	74.74	0.70
Total	106			

1985

	Observed	**Percent**	**Expected**	**(O-E-.5)2/E**
Law-Substance	19	19.0%	25.68	2.01
Other	68	55.7%	61.26	0.64
Total	87			

X^2 = 4.56
[1 df: if X^2 > 3.84, p < .05]

[File: ANAEDE8 (8-25-89) (4-27-89 data)]



These results strongly suggest that *Chevron* discouraged remands based on substantive law. The effect on substantive remands is shown graphically in Chart 14. The post-*Chevron* "slice" representing substantive reasons is much smaller than the pre*Chevron* slice for two reasons: fewer remands overall, and a smaller proportion of remands being made on the grounds of an error of substantive law.

Overall, our analysis strongly refutes the law skeptics. Our data clearly establish that subsequent decisions were being shaped by *Chevron*'s strong outcomes and outcome displacement effects. Our aggregate data are at their most ambiguous with respect to the existence of a reasons displacement effect. The total number of remands based on grounds other than substantive law was constant, but this total increased as a percentage of all remands. We cannot rule out the possibility that some courts may have responded to *Chevron* strategically by exploiting the leverage that remained available to them[114]--their residual power to select the particular reasons for the remand. Indeed, our separate analysis of the effects of *Chevron* on the D.C. Circuit[115] strongly suggests that some courts may have been trying to circumvent that doctrinal change. These effects, however, do not show up as clear evidence of a "reasons displacement effect" in the aggregate data. All that may fairly be said based on the aggregate data is that there was a dramatic decrease in substantive law remands following *Chevron* and that the number of remands in other categories remained constant. This is strong evidence that *Chevron* changed the overall distribution of outcomes, but it does not exclude the possibility that the intended effect of a new rule can be avoided or blunted in some individual cases.

Persistence of Effects.

The striking disparities in the rates of remands and reversals between the 1984 and 1985 datasets and the shift in grounds for remands in the wake of *Chevron* led us to wonder whether the effects that we had observed would be temporary or persistent. We thought that good arguments could be made for either prediction.

The simplest, most straightforward hypothesis based on our comparison of the 1984 and 1985 data was that the post-*Chevron* changes would endure. If the lower courts were willing to follow *Chevron* (as our analysis of the 1985 data indicated they clearly were), one of their most powerful weapons for overruling agencies--their ability to impose a judicial interpretation of the statute--had been disarmed. In addition, *Chevron* seemed to comport with the long-term trends in American administrative law toward increasing deference to agency law-making.[116]

On the other hand, we could also easily imagine several reasons why the post-*Chevron* changes might not endure. The passage of time itself might erode the effects we had observed shortly after *Chevron*. Perhaps lower courts are relatively sensitive to doctrinal changes in the immediate wake of a Supreme Court decision but the impact of the change is attenuated over time as new cases and other issues gain prominence. If this hypothesis were true, one would expect that remand and reversal rates would gradually drift back toward their long-term historical averages. A variation of this "regression toward the mean" hypothesis turns on what political scientist Carl Friedrich called the "rule of anticipated reactions."[117] Once everyone in the system--lawyers, lower court judges, and agencies--knows about *Chevron*, everyone will factor the changes that it made in the law into their actions, and after a temporary period of adjustment, the world will operate pretty much as it did before.

A third, alternative hypothesis would predict some decrease in agency success rates between 1985 and 1988 not because the environment had changed but because the law itself changed after *Chevron*. Between 1985 and 1988, the Supreme Court appeared to recede from the position of extreme deference to agency constructions that the Court had seemed to endorse in *Chevron* and its immediate progeny.[118] The most prominent of these decisions was *INS v. Cardoza-Fonseca*,[119] decided in 1987. Over the strong objection of Justice Antonin Scalia in his concurrence that the majority's approach was "not an interpretation but an evisceration of *Chevron*,"[120] the Court in *Cardoza-Fonseca* reasserted judicial supremacy as "the final authority on issues of statutory construction,"[121] at least where "traditional tools of statutory construction" may be employed to determine the statute's meaning.[122]

In order to determine whether the observed changes in reversal and remand rates in the wake of *Chevron* were indeed transitory, we expanded our study to include a 2-month period in the then-most recent advance sheets (covering cases decided during March and April 1988). While the "88CASES" dataset was only about one-quarter the size of the "85CASES" dataset, we hoped that comparing the two would allow us to assess the durability of *Chevron*'s effects on appellate court behavior.

Table 8, which follows, analyses the pattern of results during the 2-month period in 1988 as compared to the 1985 sample period.

Table 8 -Distribution of Outcomes - Chi Square Test

1988

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Affirmed	111	75.5%	116.58	0.27
Reversed	12	8.2%	11.87	0.00
Remanded	25	17.0%	14.94	6.77
Other	3	2.0%	7.60	2.79
Total	151	102.72%		
No. Cases	147			

1985

	Observed	**Percent**	**Expected**	**(O-E)2/E**
Affirmed	763	81.3%	757.42	0.04
Reversed	77	8.2%	77.13	0.00
Remanded	87	9.3%	97.06	1.04
Other	54	5.8%	49.40	0.43
Total	981	104.58%		
No. Cases	938			

X2 = 11.34

[3 df: if $X^2 >$ 11.34, $p < .01$]

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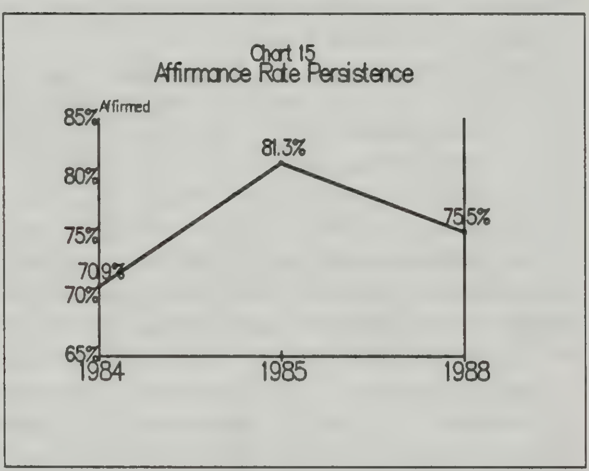


The 1988 data shows an affirmance rate of 75.5%; this is roughly halfway between the pre*Chevron* affirmance rate of 70.9% and the post-*Chevron* affirmance rate of 81.3%. See Chart 15. Since the differences in outcomes between the 1988 and 1985 datasets are statistically significant at the 99 percent confidence level, we can say with a high degree of certainty that they are not merely the result of random statistical variation.

What we cannot say with a similar level of confidence is why the 1988 outcomes are different from the 1985 ones. It is very tempting to conclude that the refinement of the legal doctrine in post-*Chevron* cases such as *Cardoza-Fonseca* produced a corresponding adjustment in agency success rates.

This suggests the tantalizing hypothesis that the results of judicial review over large numbers of cases may be far more sensitive to subtle changes in legal doctrine than we had anticipated. Unfortunately, our analysis does not permit us to test this hypothesis, for we cannot exclude the possibility that the passage of time, other changes in legal doctrine, the changing composition of the judiciary, or some other confounding factor may account for the observed changes in agency success rates between *Chevron* and early 1988. What we can say with some certainty, however, is that the 1988 agency success rate was lower than the 1985 agency success rate and that this difference was not merely a random statistical variation.

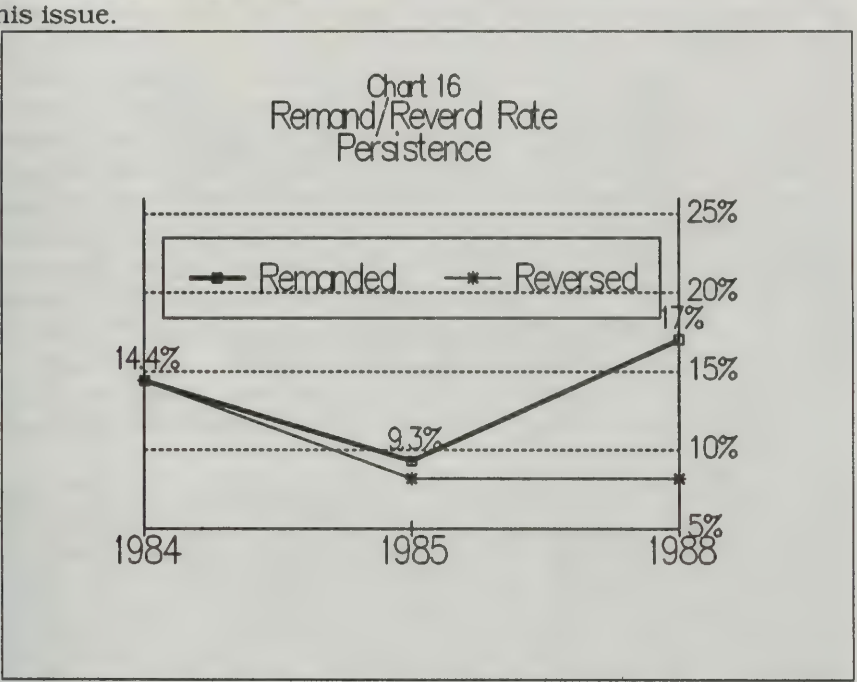
The most striking difference that emerges from the 1988 and 1985 datasets is a pronounced increase in the percentage of cases remanded. As shown in Table 8 above, remands in 1985 accounted for only 9.3% of cases; by 1988 the percentage of cases remanded had almost doubled to 17.0%. When normalized to adjust for difference in the size of the datasets, the frequency of remands increased by 83.4 percent from 1985 to 1988, as shown in Table 9, which follows.

Table 9-Change in Results (1988 vs. 1985)

	% Chng (Norm.)
Affirmed	-7.2%
Reversed	-0.6%
Remanded	+83.4%
Other	-64.6%

We had expected that *Chevron* would induce courts to increase the frequency of remands, as opposed to outright reversals. By 1988, courts were indeed remanding more frequently than they had done in 1985, right after *Chevron*. Most of the increased remands, however, were displacing not reversals (which remained unchanged) but "other" dispositions. Unfortunately, the data for 1988 are too limited to allow us to say anything definitive about changes in the grounds for remands. But the courts' increasing propensity to remand suggests that within a few years of *Chevron*, the increase in remands that we had predicted took place after all; it simply occurred somewhat later than we had anticipated.

We also expected a "reasons displacement effect," whereby courts would shift from substantive-law based reversals and remands to remands on other grounds,[123] but the number of remands in our 1988 dataset was too small to derive significant conclusions on this issue.

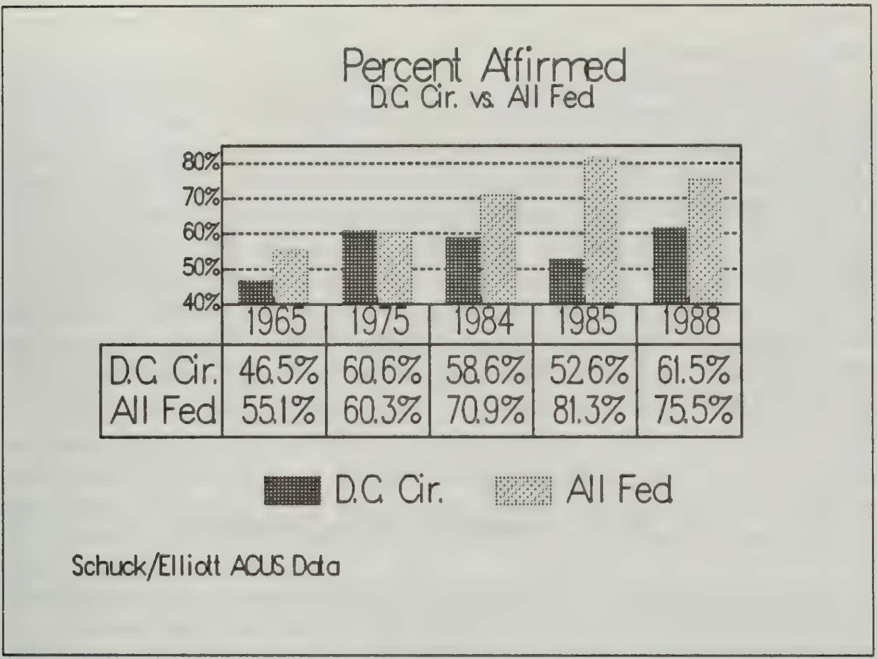


When we factor into our analysis the longer-term perspective provided by the 1988 data, the following picture emerges. Within a few months after *Chevron*, the affirmance rate rose substantially; reversals and remands decreased about equally to account for the increased affirmance rate. Over the longer term, however, remands gradually returned to and then exceeded their pre*Chevron* levels, eroding about half of the increase in affirmances that *Chevron* had produced. Outright reversals remained infrequent. These changes are presented graphically in Chart 16.

Court-Specific Effects

So far, we have discussed the issue of the "effects of *Chevron*" as if the federal courts were a monolith. The organization of our datasets, however, permits us to make comparisons to assess whether particular courts or categories of cases are consistent or run counter to the national trends. A particularly interesting example of how aggregate data may be misleading involves the D.C. Circuit's behavior in the wake of the *Chevron* decision. Chart 16A on the next page compares historical rates of affirmance in administrative law cases in the D.C. Circuit against the comparable rates in the circuit courts as a whole (including the D.C. Circuit). Chart 16A shows that the affirmance rates in the D.C. Circuit were similar to the aggregate affirmance rate for all circuit courts in 1965 and 1975. By the mid-1980's, however, a striking disparity had developed. On the eve of the Supreme Court's 1984 decision in *Chevron*, the D.C. Circuit was affirming in only 58.6% of administrative law cases, compared to a national circuit court average of 70.9%. This difference may in part reflect the fact that the D.C. Circuit handles more of the multiple-issue generic rulemakings, which are affirmed less often.[124] But the disparity also suggests that the extra "hard look" in administrative law cases which is sometimes attributed to the D.C. Circuit was indeed occurring in the mid-1980's just before *Chevron* was decided.

We are tempted to speculate that the relatively low affirmance rate for administrative law cases in the D.C. Circuit may have been one motive for the Supreme Court's clear message in *Chevron* that lower courts should defer more to agency constructions of statutes. When we compare the D.C. Circuit's affirmance rate with the national circuit court average in 1985, just after *Chevron*, we find that the Supreme Court's message was not immediately effective in inducing greater deference by the D.C. Circuit. Between 1984 and 1985, while the national average affirmance rate rose from 70.9% to 81.3%, the affirmance rate in the D.C. Circuit actually declined, from 58.6% to 52.6%. Further analysis using our research methodology could shed light on the particular techniques which the D.C. Circuit used to buck the



	1965	1975	1984	1985	1988
D.C. Cir.	46.5%	60.6%	58.6%	52.6%	61.5%
All Fed	55.1%	60.3%	70.9%	81.3%	75.5%

Schuck/Elliott ACUS Data

national post-*Chevron* trend of increasing deference, although our dataset may be too small to permit statistically significant conclusions to be drawn on this issue. In any event, by 1988 the gap between the D.C. Circuit and the other circuit courts had narrowed (61.5% versus 75.5%). Still, affirmance rates remained almost 15% lower in the D.C. Circuit than the average for the other circuits.

Agency-Specific Effects

The data on agency-specific success rates yield another significant finding: for most agency groups, the data suggest a pronounced outcome displacement effect in the wake of *Chevron*. For example, the proportion of the cases in the residual category which were affirmed in toto increased from 52% to 78% between the pre and post-*Chevron* periods, and the affirmance rate for the health, safety, and environmental agency grouping, the NLRB, and the Patent Office also increased substantially between those periods. But this pattern was not evident for all agency groupings. For two of them (immigration and "other regulatory"), the success rate actually declined (albeit only slightly) after

Chevron. The "*Chevron* effect," it appears, is an even more complex phenomenon than we have suggested.

If we look instead at the agency "failure rate," defined as the proportion of cases in which the reviewing court simply reversed, thus depriving the agency of any further opportunity to have its way in the case,[125] similar patterns are revealed. The failure rate varied considerably from grouping to grouping; it ranged from 13.5% in the residual category to 2.3% for agencies in departments other than Labor. If anything, the *Chevron* effect was even stronger when this measure was used; several groupings' failure rates declined substantially (for health, safety and environmental agencies, from 28% to 6%, and for the NLRB, from 19% to 5%).[126]

D. What Happens After Remand

Judicial opinions are stories, albeit elaborate, highly stylized ones, and only the most unimaginative reader of opinions could finish them without wondering how the stories actually ended.[127] Courts in administrative law cases especially pique our curiosity when they forswear their power to resolve the dispute themselves and instead remand it to the agency to write the story's conclusion. In such cases we naturally want to know about the denouement. Specifically, we ask: What did the agency do procedurally once it got the case back? What was the outcome and did the court's intervention really matter? How long did the proceedings after remand take? And were there intervening events that affected the outcome? Taken together, these questions pose what is probably the least studied but most important issue surrounding administrative law: what difference does judicial review of agency action make?

Unfortunately, our study cannot definitively resolve this issue. Our data on post-remand events, which relate to the 1984-85 period, consist entirely of the responses of the parties' lawyers to a questionnaire and follow-up telephone interviews. They are therefore inevitably impressionistic. In addition, the lawyers may have tended to put a somewhat better (from their clients' perspective) face on the outcomes than more detached observers would.[128] Nevertheless, the data do permit us to shed some light on some of the empirical questions noted above.

Post-Remand Procedures

We began with some general hypotheses concerning what happens procedurally once a case is returned to an agency. First, we expected that many remands would lead to informal settlements or withdrawals. The delay incident to any remand, together with the further agency proceedings that a remand might necessitate, could be so costly that the parties would seek a cost-minimizing alternative to continued litigation. More generally, remand decisions would almost certainly alter the parties' prospects, bargaining positions and incentives to litigate.[129] Second, the reasons displacement effect that we found should support the hypothesis that agencies to which cases were remanded in the post-*Chevron* period would more frequently hold additional hearings or otherwise supplement the record. The agencies, we supposed, would need to institute such procedures in order to cure the factual or explanatory defects identified by the reviewing courts.

The data confirmed our first hypothesis. The lawyers reported that in about 40% of the remanded cases in 1985, no further proceedings occurred.[131] The number of remands that "wash out" in this way increased by about 10% after *Chevron*. Among the agency clusters, the NLRB, Department of Labor and "other regulatory" were the ones least likely to undertake further post-remand proceedings. This tends to confirm our suspicion that adjudications, which accounted for virtually all of the NLRB and DOL cases, are easier to settle or drop than other kinds of proceedings.

Our second hypothesis--that remands after *Chevron* would more frequently cause the agencies to hold additional hearings or revise the record--was not borne out. Indeed the opposite was true. Although proceedings of that kind were instituted in roughly 30% of the remanded cases during the pre*Chevron* period, that figure declined to about 18% in the post-*Chevron* period. This mystery only deepened when we disaggregated the remands in order to focus upon the fact-based and/or rationale-based ones, which were more common after *Chevron* and were expected to necessitate record-revising procedures after remand. Contrary to expectations, we found that such procedures were more likely to be employed before *Chevron* than after. Although the post-*Chevron* increase in "wash-out" cases probably accounts for some of this decline, we are unable to explain the rest of it.

More generally, the data on post-remand procedures reveal certain features of the structure of post-remand activity. At a gross level, we can see what happens procedurally. As already mentioned, about 40% of the remanded cases prompted no further action while only 30% of the remands (18% after *Chevron*) actually led to procedures looking toward revising the administrative record. The data also indicate that in another 15-20% of the remands, the agency instead issued a new opinion, and in most of those the agency sought to justify its earlier position by adopting a new legal theory or interpretation rather than simply supplying additional explanation. The remainder of the cases were coded "other."

When we disaggregate the post-remand activity data by circuit court, the most interesting finding is that remands in the D.C. Circuit were less likely to "wash out" than in the other circuits combined.[131] It is not at all clear why this should be unless the greater significance of D.C. Circuit cases makes them more difficult to settle informally.

Post-Remand Outcomes

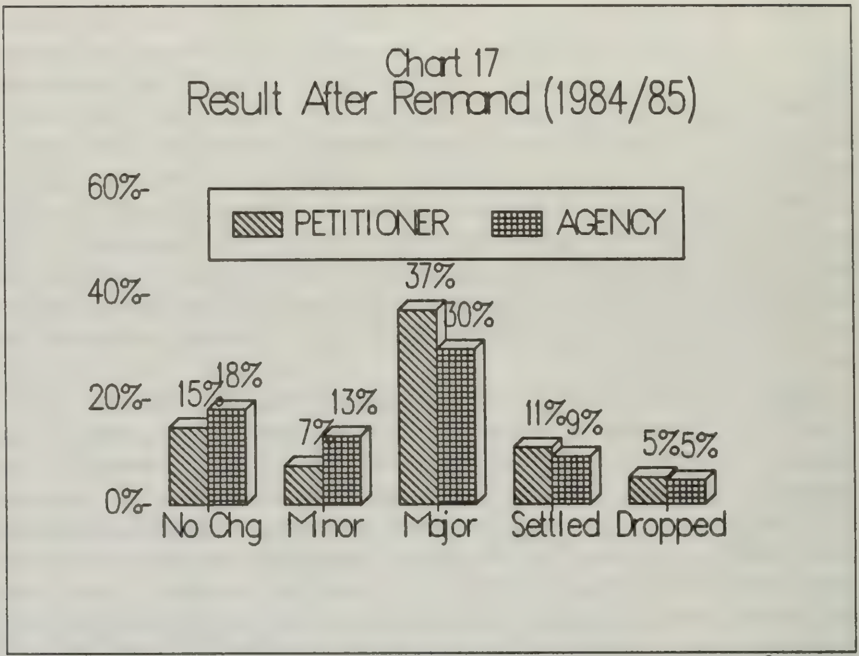
We began our study with a strong belief in what might be called the "agency gets the last word" hypothesis. That is, we expected that an agency to which a reviewing court remands a case usually will end up reaffirming the position that it originally took.

This hypothesis was grounded in the same kind of Realist considerations that had led us (erroneously as it turned out) to doubt that the Supreme Court's *Chevron* decision would much affect how the courts of appeal disposed of agency cases. Agencies generally make policy decisions for what they think are compelling political, institutional, and programmatic reasons. By remanding, a court does not eliminate those goals; it simply strengthens the agency's incentives to find other ways to achieve them. The locus of the last word, however, depends not only upon the agency's motivation but also upon the degree of constraint created by the control techniques available to a remanding court. Courts generally employ these techniques in ways that are designed to allow the agency considerable discretion and flexibility as to how to respond to the remand, thus exploiting the technical and policy expertise for which the agencies were established in the first place.

For a reviewing court to have the last word, it must either write remand opinions prescribing quite specifically what the agency may and may not do with the remanded case,[132] or engage in repeated remands until the agency complies with the court's wishes.[133] Unless the court is prepared to adopt one of these strategies, however, it may not as a practical matter be able to prevent the agency from adhering to the agency's original position.[134] Yet both these strategies are problematic; each risks undermining the principle of judicial respect for the agency's expert judgment and programmatic responsibilities. We therefore expected that agencies would usually be driven and permitted to have the last word.

These considerations led us to formulate another, more specific hypothesis based upon the supposed interaction of the nature of reviewing court controls and the specific reasons for the remand. We supposed that agencies are most likely to reaffirm their original decisions after rationale-based remands and are least likely to do so after law-based remands. In particular, the agency should be least constrained when the reviewing court does not reject what the agency has done but simply demands a fuller explanation of, and justification for, that action. It should be most constrained when the court reverses it for having applied the wrong legal standard; in that event, the correct legal standard may well preclude the agency from doing what it would like to do regardless of which form of words and justification the agency is able to come up with.

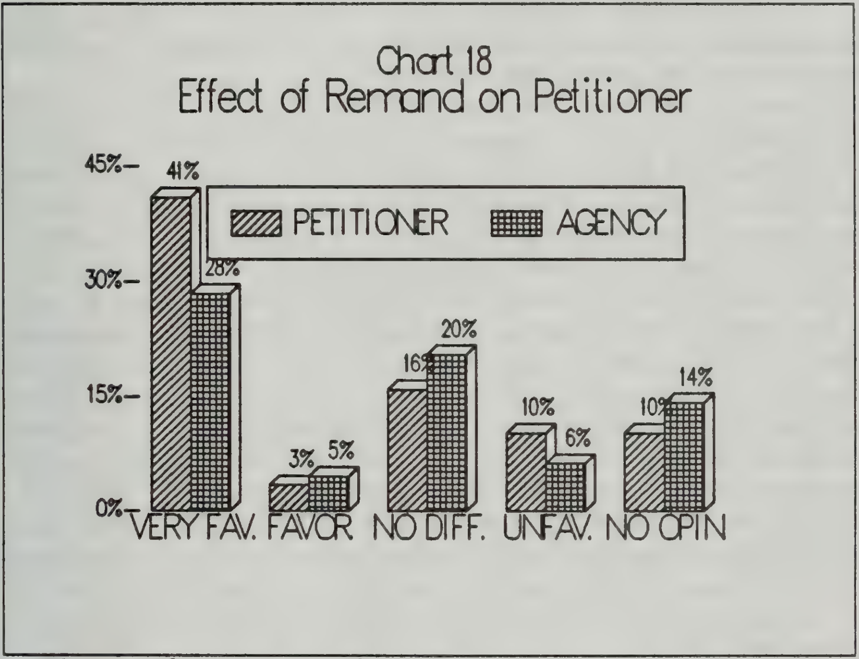
The data provide only weak support for our "agency gets the last word" hypothesis. Our most striking findings are that the agencies reaffirmed their original decisions in only 20-25% of the remanded cases (*Chevron* did not really alter this percentage), whereas in a substantially larger share of cases--about 40% of the remands during the pre*Chevron* period and about 37% of those after *Chevron*--the post-remand process actually produced what the lawyers agreed could be characterized as "major changes."[135] See Chart 17.



This "major changes" finding is especially impressive for two reasons. First, petitioners' and agency's lawyers, who might have been expected to diverge greatly on this point, in fact came up with roughly similar estimates of the occurrence of "major changes." Second, the agencies were much more likely to adopt these changes by relying upon the "old facts" (i.e.,, facts that were already in the preremand record) than by generating and relying upon "new" ones.[136] This suggests that the mere occurrence of a remand, without more, frequently causes an agency not simply to reconsider its original position but to alter it in important ways.

It would be interesting to know why and under what circumstances agencies change their original positions after remand.[137] When we broke the data down by agency cluster, the only pattern that we found was that the health, safety, and environmental agencies and the INS were the least likely to make major changes after remand.[138] The circuit-by-circuit breakdown failed to reveal any strong pattern; agencies were less likely to make major changes in cases remanded from the D.C. Circuit than in those from other circuits generally but the differences were not great.

More surprising was the fact that breaking the data down according to remand type failed to provide any real support for our hypothesis, noted above, that agencies subjected to law-based remands would be the least likely to just reaffirm. Apparently, the agency's impetus to adopt changes is fairly independent of the degree of freedom allowed to the agency by the particular type of remand. At a minimum, this would seem to demonstrate that agencies are more open-minded than most commentators have believed. A more speculative proposition is that even when courts make rationale-based or fact-based remands--that is, remands that leave the agency freest to reaffirm its original position--they often communicate their doubts about the merits of the underlying agency policy, doubts that the agencies apparently take seriously.



These inferences are further strengthened by the lawyers' responses to two other questions. About 40% responded affirmatively to the query, "did the court's remand affect the ultimate result reached by the agency?"[139] Here again, we were struck not only by how large this response was but also by how the lawyers' responses converged on this point.[140] And when we asked the nonagency lawyers to describe "the practical effect on your client of the ultimate resolution by the agency after the court's remand," about 40% selected the response "much more favorable to client"[141] while only about 17% selected the response "about the same effect on the client as before remand." See Chart 18.

The Duration of Post-Remand Proceedings

We initially hypothesized that the elapsed time between the date of the remand and the date of final agency action after remand would vary according to the type of administrative proceeding, the type of remand, and type of agency. In particular, we expected that these proceedings would take longer in rulemaking proceedings than in adjudications; in proceedings involving fact-based remands than in those involving law-based or rationale-based remands; and in health, safety and environmental agencies than in others. Our reasons for these expectations were discussed earlier.[142]

Duration responses were obtained for 127 cases, or about 90% of the cases that were remanded in the 1984-85 period.[143] The data reveal that the post-remand proceedings at the agency level alone took about 17 months to complete on average.[144] Almost two-thirds of remands were completed within a year, but one in ten was still pending almost 5 years after the court remanded.[145]

The data on the duration of different proceeding types seemed to contradict our hypothesis that rulemakings would take longer than adjudications. But because the total number of rulemakings in our data set was small (only ten, or about 8% of the total during the entire 1984-85 period) and the standard deviations around all of the duration averages were large, the hypothesis cannot really be said to have been refuted. Moreover, the differences in duration between the two proceeding types were generally small and went in different directions.[146] Ratemakings took the longest time to complete (more than 30 months on average) but there were relatively few of them (six during the entire period).

When we analyzed the duration data according to the type of remand ordered by the court, we failed to confirm our hypothesis that fact-based remands would take longer to complete than law-based or rationale-based ones. Law-based remands took the least time and rationale-based remands took the most time. Here too, however, the differences were small (generally less than 2 months) and the standard deviations were large.

Similarly, our analysis of the data according to the particular agency cluster failed to confirm our hypothesis that health, safety and environmental agencies would take longer to complete. Indeed, the only pattern that we could discern was that the remands to the INS took longest to complete but even here, the number of cases was too small to justify much confidence in this observation.

Significant Post-Remand Events

In administrative law, the adage "justice delayed is justice denied" has a special meaning. It is not simply that the victim of agency illegality may, in the absence of a stay, continue to suffer while the agency's action remains in effect. It is also that the passage of time affects the substance of administrative decisions more directly than it does decisions made in most other legal contexts.

This difference reflects two distinctive features of administrative law. One is that the period of time elapsing between the original agency decision and the agency's post-remand response is often so protracted that new developments are bound to occur. The other is that the norms of administrative law permit, and sometimes even require, those new developments to influence the merits of the underlying agency decision in ways that would not be appropriate in a court decision. The value placed upon the agency's technical expertise, broad policy discretion, and political responsiveness means that agencies, to a far greater extent than courts, are expected to take certain kinds of changes into account in their policy decisions. For example, the advent of a new President, changes in agency leadership, and other political factors are ordinarily deemed relevant to the merits.[147] Similarly, the agency must ordinarily take changing economic conditions, statutory contexts, and court rulings into account. Far from seeking to insulate the agency from these influences, administrative law recognizes their affirmative value in shaping the climate, and often the substance, of decisions.

These normative considerations led us to formulate several descriptive hypotheses about the kinds of events that occur after remand and may influence the agency's subsequent decision. We expected that the mere fact of delay, which increases the probability that intervening events will occur, would affect the outcome of many agency decisions,[148] and that the most important of these events would be changes in presidential or agency leadership,[149] changes in the relevant law (other than that represented by the remand itself), and changes in economic or competitive conditions germane to the agency's programmatic agenda. Less important, we supposed, would be changes in the individual lawyers handling the particular case.

The data reveal a high degree of agreement between the agency and opposing lawyers concerning the incidence of significant intervening events. Unfortunately, the wording of our question--"Were there any significant intervening events. . . which might help to explain any change"--was not as clear as it might have been. We failed to make clear that we were concerned only with remands in which the agency altered its original decision. This was only a subset (albeit a surprisingly large one, as we learned) of all remanded cases. In what follows, then, we have assumed that our respondents so understood the question.

In almost one-third of the remands leading to changes (32%), the lawyers responded either "no" or "don't know." This suggests that when agencies change their positions on remand, those changes may often have little to do with changes in the relevant personnel, politics, law, policy, or economic conditions. In those cases, other factors, including the appellate court's remand-rebuke to the agency, may better account for the agency's change of heart.

Given that the remand data set occurred around the midpoint of a long presidential administration, we were not surprised to find that the agency's change was caused by a change of national administration or of agency heads in fewer than 2% of the remands. Perhaps for similar reasons, an even smaller percentage of the changes after remand were attributed to a change in the agency staff or lawyer handling the case. Changes in economic or competitive conditions were cited as the reason for the agency's new position in only about 2% of the remands.

The single most frequent reason cited for the agencies' post-remand changes was the occurrence of a significant change in the law (in legislation, court decisions, or agency policy) other than the legal change contained in the remand itself. But the fact that this affected only 17% of the changed decisions on remand suggests that agencies that adopt new positions usually do so for reasons having to do with factors internal to the agency itself rather than for "environmental" reasons.

Our residual category of intervening events ("other") was also large. Fortunately, our interviewers often made notations on the coding sheets describing which "other" events the lawyers had in mind. They included: a different administrative law judge on remand; publicity about the case; the pendency of other cases; a compromise within the affected industry; a better rationale by the agency; agency policy change; changes in circumstances that facilitated settlement; publication of a congressional report; and a change in the agency's partisan composition.

We also expected that intervening changes in leadership, law and economic conditions would be most influential in those types of proceedings and forums that we assumed would be most oriented to policy and political considerations: rulemakings, ratemakings, and D.C. Circuit cases generally. When we analyzed the data according to proceeding type, we could not draw any strong inferences from it because although roughly one-fourth of adjudications were said to be influenced by those kinds of changes, the number of rulemakings and ratemakings in the sample was too small to permit a meaningful comparison. When we analyzed the data according to circuit, we did not find the hypothesized relationship; in fact, the results of D.C. Circuit remands were somewhat less likely to be influenced by such changes than the remands in the other circuits but the differences were not great.

III. Conclusion

A. A Note on the Epidemiological Study of Caselaw

Epidemiology is the science that studies the incidence of disease in populations.[150] In this study, we have attempted to adapt epidemiological methods to the study of law. Neither of us is a trained epidemiologist or biostatistician; rather, we are lawyers who have developed only a passing acquaintance with epidemiology through our shared interest in toxic torts, an area of law in which epidemiological studies are increasingly important. Still, we think that our study confirms for administrative law what the work of some other investigators has already demonstrated in other fields[151]--that using large-scale, empirical studies of populations of cases to subject propositions about law and legal change to empirical testing is a promising approach.

The need to exploit empirical methods for studying law is apparent if one considers the techniques that lawyers have used traditionally to study changes in the law. The staple remains the "leading cases" method, which can be traced back to the work of Christopher Columbus Langdell in the 19th century. It posits that the "law" (defined with Holmes as "what the courts will do in fact")[152] can be summed up in a few exemplary cases. These cases, which are generally selected by academic writers using unconscious, or at least unstated, principles of selection, are in turn assumed to state principles of legal doctrine that explain the results in the law more generally.

As George Priest has observed, such traditional methods of doctrinal analysis have not proved very useful in making predictions about law and better methods are needed.[153] Our study, we think, confirms Priest's skepticism about the validity of forming opinions about trends in the law based on statements in a few leading cases and articles.

Unlike the leading case method, our epidemiological approach has been to observe variation over time within populations of cases and then to analyze those variations in order to discern how doctrine evolves within legal systems.[154] Epidemiological methods compare changes in the frequency of characteristics (usually, diseases) within population groups over time. In one type of epidemiological study, the "prospective or cohort" study, two population groups are defined. One tries to select two populations that are as similar as possible except that one group has been exposed to a suspected etiologic agent and the other has not. The possibility that some other factor, some "confounding variable," also differentiates the two populations and accounts for the observed differences between them can never be totally eliminated.

We have tried to adapt this method by comparing the frequency of various legal results (e.g., appellate court affirmances of administrative decisions) in populations of cases that have either been "exposed" or "not exposed" to a given change in legal doctrine (i.e., the *Chevron* decision). From these comparisons, we have drawn conclusions about the strength of the correlation between that change in legal doctrine and the outcomes in subsequent cases. If the populations are suitable, and it is possible to rule out likely confounding factors, causal inferences can be drawn with some degree of confidence.

Our use of these methods has not always been successful.[155] But we are encouraged by the fact that the state of knowledge about what agencies and courts actually do in the generality of cases and about how authoritative norms influence them is so primitive that studies of this kind are likely to produce valuable information regardless of what their data say. If it had turned out, for example, that the *Chevron* decision did not influence reviewing courts, that would have been as interesting a finding as what we did find.

B. Summary of Principal Findings

Our study had four broad objectives. First, we hoped to produce some baseline information about the character, magnitude, and consequences of judicial review of federal agency decisions. Second, by comparing this information at different points during a period spanning two decades (1965-1985) in which the court-agency relationship is widely thought to have undergone a transformation, we hoped to discern changes in these parameters over time. Third, we hoped to learn more about remands, especially about what actually happens when the cases go back to the agencies that originated them. Finally, we hoped to gauge the effectiveness of the Supreme Court's highly controversial effort in *Chevron* to regulate the court-agency relationship through a change in legal doctrine.

Our analysis, we think, increases our understanding on each of these points. As we noted at the end of Part I, however, we regard our findings as more suggestive than conclusive. Like the data on which they are based, these findings are incomplete and in some cases impressionistic. They cannot, nor do they purport to, begin to capture the rich complexity and diversity of federal administrative law. In this regard, detailed case studies can provide far more textured accounts of court-agency relationships than our data permit.[156]

But such texture and detail come at a price. Being agency-specific, they can tell us little about the larger patterns which the broad spectrum of federal agencies and courts trace on the political-legal landscape. These larger patterns can only be discerned through the kind of panoramic, systemic, inevitably imprecise bird's-eye view attempted here. That view requires that a much richer database be amassed and a greater analytical effort mounted.[157]

We organize this summary of our principal findings around the four goals of the study, which in turn defined the four major sections of Part II.

The Changing Style of Appellate Opinions

Our first finding, based on data published by the Administrative Office of the U.S. Courts, is well known: the administrative law caseload in the circuit courts has increased rapidly and, at least as measured by what the Office calls "merits terminations" (as distinguished from filings), fairly steadily. Less well known (but also based on that published data) is that this larger caseload constitutes a rather small and steadily shrinking portion of the circuit courts' dockets--only 7% in 1987.

A striking finding with possibly large implications for administrative law concerns the phenomenon of "table decisions"--summary decisions for which no reasoning or factual description is published. Today, the majority of administrative law cases are disposed of in this way. In 1985, almost 60% of all dispositions were by these "table decisions," compared to 38% in 1975 and an unknown number in 1965. (See Table 1.)

This phenomenon has received relatively little attention or sustained analysis by academic commentators, and its significance for administrative law is not yet clear. It is tempting to speculate on how the predominance of table decisions has affected the affirmance rate, yet even the direction of causality remains uncertain. As we have seen and as one might expect, all but a handful (albeit a surprisingly large handful) of these table decisions are affirmances. The dramatically increased use of table dispositions may reflect an increase in affirmances caused by other factors; in this view, table decisions are simply a less time-consuming way to clear judicial dockets than writing full published opinions. On the other hand, table decisions may be a cause of a higher affirmance rate, rather than (or as well as) an effect. In this view, docket considerations motivate reviewing courts to dispose of cases summarily, and summary dispositions can be accomplished most readily through affirmance rather than reversal or remand. Unfortunately, our data do not permit us to determine which of these views is correct.

The potential importance of table decisions, however, goes well beyond its positive association with the affirmance rate. Such a mode of decisionmaking raises fundamental questions of legal process, legitimacy, and public perception. When courts dispose of a large number of agency cases summarily and without opinion, administrative law is to that extent deprived of the benefits of reasoned justification. In that event, it loses the salutary intellectual discipline and normative significance that opinion writing imposes and its processes and outcomes appear arbitrary. Without reason-giving, administrative law becomes even more opaque and incoherent than it already is. On the other hand, routine cases should be handled routinely and busy courts should not have to expend scarce time and effort belaboring the obvious and familiar. Because table decisions' domination of the administrative law caseload has occurred swiftly and without much reflection, it is by no means clear that the current practice strikes the optimal balance between these competing considerations. This phenomenon clearly warrants further investigation.

Our findings concerning opinion length and footnoting are of lesser importance, of course, but a few of them are nevertheless of some interest for what they may reveal about the emerging style of administrative law opinion writing and the effect of docket pressures. In general, opinions written in the mid-1980s were much shorter on average than those written a decade earlier, although this effect is almost entirely due to the effect on averages of the courts' increased use of table decisions. The D.C. Circuit writes longer and more heavily footnoted opinions than the other circuits; in this respect it is even more of an outlier than it was in 1975.

Of greater significance perhaps is our finding that consensus within circuit courts, as measured by the proportion of one-opinion cases, increased in all circuits between 1965 and 1975 and remained unchanged a decade later even when table decisions are excluded. Including them, of course, would dramatically strengthen this consensus index. Maintenance of this level of consensus at a time (1984-85) well into an administration that was determined to appoint federal judges of a different ideological stripe is impressive. Again, the D.C. Circuit was an outlier; in all periods its consensus level was lower than that in the other circuits. Yet even the D.C. Circuit's consensus level appeared to increase between 1975 and 1984-85, although more recent appointments to that court may well have reduced that consensus.

The Ages of Administrative Law

The most important finding that emerges from our 20-year punctuated longitudinal analysis is that the circuit courts are affirming agency decisions at a steadily increasing rate, a rate that approximated 76% in 1984-85 and reached over 81% in 1985 just after *Chevron*. When we measure the petitioners' probability of success--combining the reversals and the 40% of the remands in which the lawyers report a "major change" in the agency's position on remand--we find that it was about 12% in 1985, a figure that our 1988 data suggest may have increased slightly as *Chevron*'s effect weakened. A success rate of only 12% raises an important question about why petitioners appeal as frequently as they do. In Part II we speculated that with respect to some but not all agencies, the explanation may partly be found in the possibilities for using appeals to delay the effect of agency action. This question clearly warrants further research.

Our findings concerning the growth of rulemaking were somewhat surprising. Although rulemaking's share of the administrative law caseload increased twenty-fold between 1965 and 1984-85, it still constituted only 6.5% in the latter period. Even more striking is the fact that when we excluded from our analysis agencies that apparently never used rulemaking and examined only those that sometimes use it, rulemaking's share was still only 9.4% in 1984-85, a share that was actually lower than it had been in 1975. We speculated in Part II that reviewing courts' imposition of adjudicatory-type procedural and evidentiary burdens on rulemaking during this period may have had the perverse effect of discouraging its use.

This finding relates to our finding concerning the agency composition of the administrative law caseload, which has changed dramatically since 1965. A docket once dominated by labor and patent cases is now dominated by labor, personnel, and immigration cases--virtually all of which are adjudications. Agencies that engage in "social regulation" accounted for less than 4% of the caseload in 1984-85. When we examined the circuit court composition of the caseload, we found that the D.C. Circuit's share of the national administrative law docket remained remarkably stable over the 20-year period, comprising about 12% in 1984-85. The Federal Circuit's share of 36% was the largest, distantly followed by the Ninth Circuit (15%). Another striking finding was the steady decline in, and the rarity of, *en banc* decisions, especially outside the Federal Circuit. Only about 2% of the cases were heard *en banc* in 1984-85.

Remands and the Chevron Effect

If our data on dispositions and the use of table decisions indicate a growing tendency of reviewing courts to defer to agencies, our data on remands also suggest that the Supreme Court's *Chevron* decision has reinforced that deference, pushing the overall affirmance rate to levels higher than those that prevailed in 1965, 1975, and 1984 just before *Chevron* was decided. Affirmances increased by almost 15% after *Chevron*, and both remands and reversals declined by roughly 40%.[158] The post-*Chevron* affirmance rates, we found, were bimodally distributed; one group of agencies clustered around 80%, while another group clustered around 60%. We suggested that the different subject matters with which these two groups of agencies are concerned, reflected in the fact that the first group relies almost exclusively on adjudication while the other sometimes uses rulemaking, might help explain this distribution.

When we refined our analysis of remands in order to appraise *Chevron*'s effect more precisely, four findings of interest emerged. First, more of the increased affirmances after *Chevron* "came from" reduced reversals than from reduced remands. This "outcome displacement effect" was fully consistent with the purpose of *Chevron*, which was to make it harder for reviewing courts to reverse for agency errors of law. Second, *Chevron* was immediately followed by a large decline in substantive law remands--the kind that *Chevron* aimed to discourage--while the remands remained constant. Although these data would seem to establish that *Chevron* also had a pronounced "reasons displacement effect," they are actually more equivocal than that. Third, the increase in affirmance rates after *Chevron* had eroded by 1988; the affirmance rate in 1988 had slipped to 75.5%, roughly halfway between the pre and post-*Chevron* rates. Fourth, the remand rate increased significantly between 1985 and 1988, although fewer of the increased remands "came from" reversals than *Chevron*'s logic had led us to expect.

These findings suggest that *Chevron* affected outcomes differentially and that those outcome effects differed over time. The expected affirmance-increasing effect occurred immediately but had weakened by 1988, while the expected remand-increasing effect did not occur immediately but was evident in 1988. These findings are consistent with the notions that *Chevron* achieved its intended goal in the short run, and that post-*Chevron* developments, including the Supreme Court's own weakening of *Chevron* in subsequent cases and the lower courts' strategic responses to these decisions, frustrated those purposes as time passed.

When we disaggregated the data on the effects of *Chevron* by examining particular circuits and agencies, two other striking findings emerged. We found that the D.C. Circuit, whose affirmance rates had been lower than those of the other circuits throughout the 20-year period and were far lower by the time *Chevron* was decided, responded to *Chevron* by affirming even less often than before, in sharp contrast to the other circuits which responded to the decision by increasing their already high affirmance rates. And the "outcome displacement effect" of *Chevron* turned out to vary considerably among the agency groups; the affirmance rate actually declined for the immigration agency and the "other regulatory" group.

Taken as a whole, our findings with respect to the effects of *Chevron* on remands, although not unequivocal, support a general conclusion of some significance to the analysis of legal process in administrative law. On the evidence of this study, the Supreme Court is able to effectively shape the court-agency relationship through the kind of relatively broad, open-textured rule adopted in *Chevron*. For reasons that we explained earlier, including the quite different experience following the Court's *Vermont Yankee* decision, this conclusion was unexpected.

What Happens After Remand

Our data concerning the response of agencies to judicial remands yield one especially interesting finding. Our prediction that agencies would manage to find ways to reaffirm their original decisions--what we called "the agency gets the last word" hypothesis--was not borne out. In approximately 40% of the remands, the agencies adopted "major changes" and most appeared to do so primarily because of the remand (i.e.,, on the basis of the old administrative record).

This 40% figure is much higher than we expected. But it does of course mean that 60% of the remands did not result in any "major changes." This means that petitioners succeeded in obtaining a major change in the agency's position in only about 12% of the cases--the 8% in which the circuit court reversed the agency outright, plus 40% of the 9% of the cases in which the court remanded and the agency on remand adopted a major change.

ENDNOTES

1. The few exceptions in the legal literature involve a consideration of this question in quite particular contexts. See, e.g., Williams, Hybrid Rulemaking under the Administrative Procedure Act, 42 U. CHI. L. REV. 401, 425-436 (1975) (discussing response by three agencies to judicial interpretation of APA requiring more formal procedures in informal rulemaking by EPA); Leventhal, Environmental Decision Making and the Role of the Courts, 122 U. PA. L. REV. 509, 554-55 (1974) (discussing EPA's response to remand in International Harvester case). A broader empirical study of the court-agency relationship, Gardner, Federal Courts and Agencies: An Audit of the Partnership Books, 75 COLUM. L. REV. 800 (1975), focuses upon judicial strategies of supervision rather than upon how agencies respond to remands. See generally P. Schuck, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983), at 3-12, chaps. 6, 7, and sources there cited.

Some political scientists have examined this question. See, e.g., R. Melnick, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); S. Wasby, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM (1987).

2. This irony, of course, is common to all fields, not just law. By some perversity of intellectual inquiry, the most interesting and important questions in life are usually the most elusive and opaque.

3. The number of administrative law cases in the federal appellate courts is large and growing. See Chart 1, infra page 15.

4. There are several publications devoted exclusively to administrative law doctrine. See, e.g., the Administrative Law Review (published by the American Bar Association) and the Administrative Law Journal of the American University. There are also numerous specialized journals concerned with judicial review of agency decisions in particular policy areas (e.g., Journal of Air Law and Commerce; Journal of Energy Law and Policy), and at least one leading law review publishes an annual administrative law issue (the April issue of the Duke Law Journal).

5. Mashaw and Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 YALE J. REG. 257, 275 (1987).

6. E.g., Strauss, The Place of Agencies in Government, Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984); K. Davis, DISCRETIONARY JUSTICE--A PRELIMINARY INQUIRY (1969).

7. See, e.g., Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1 (1983).

8. Davis, supra note 6, at 27, 216 (agency discretion limits effectiveness of judicial review).

9. Practitioners, needless to say, find themselves on all sides of this question; their positions depend not only upon their experiences and orientations but also upon whether they are seeking to persuade their clients to challenge or to defend the agency's position.

10. M. Shapiro, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 270-71 (1968).

11. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS.

12. 467 U.S. 837 (1984).

13. The total number of cases in our 1965-1985 sample is 2325, consisting of 372 decided in 1965, 277 decided in 1974-75, and 1676 decided in 1984-85. The number of cases in our 1988 sample is 147. The grand total, therefore, is 2472 cases. The data sets, and the reasons for constituting them as we did, are explained infra.

14. Our sample included cases from each of the 16 appellate courts (the District of Columbia Circuit, the 11 numbered circuits, the Court of Claims, the Court of Customs and Patent Appeals, the Federal Circuit, and the Temporary Emergency Court of Appeals) which heard direct appeals from executive branch agencies during the period under study. A list of the agencies, together with their coding keys, is appended as Appendix A (available on request from the Administrative Conference).

15. We excluded all cases, such as Social Security Act adjudications, that had come to the courts of appeal through the federal district courts or through specialized judicial tribunals such as the U.S. Tax Court.

16. See Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667 (1975).

17. When we ended the data collection in early 1988, two categories of remanded cases remained incomplete: (1) those in which the lawyers had not provided all of the necessary information during the initial and follow-up interviews, and (2) those that had still been "open" (i.e.,, post-remand activity was still ongoing) at that point. In an effort to include these cases in our data set, we made one final pass at them in August 1988, well after we had begun our preliminary data analysis. Even at that late date, some 3 to 5 years after the remand, we found that a certain number of cases remained in one or both of these categories. We had to drop them from the data set, at least as far as our analyses of post-remand events and evaluation of outcomes were concerned.

18. At the written request of the Administrative Conference of the U.S., each federal agency identified a contact person within the agency (usually in the general counsel's office) who would help to facilitate the data gathering for the study. The identity of the agency's and petitioner's lawyers was also usually obtainable from the published opinions.

We generally sought to interview the most junior lawyer listed there. Our assumption--that this would be the lawyer closest to, and most knowledgeable about, the details of the case--proved to be generally correct. Sometimes, of course, the lawyers who were in the best position to answer our questions were no longer employed by the agency or firm. In those cases, the interviewer attempted to locate that lawyer and when that effort failed, the interviewer was almost always able to obtain the desired information from someone else in the agency or law firm who was (or after reviewing the file could become) familiar with the matter.

19. We explain how we handled this problem infra Part II, Section 4 ("What Happens After Remand").

20. 470 U.S. 116 (1985)

21. See discussion infra Part II, Section 3, "Remands and the Chevron Effect."

22. See discussion infra Part II, Section 2(a) ("The Outcomes of Judicial Review").

23. Although this means that we actually read cases covering five time periods, we treat the two 6-month periods during 1985 as a single time period for purposes other than that of analyzing the effects of Chevron.

24. The 1965 sample covered cases decided during the 6-month period between January 1 and June 30, 1965.

25. The 1974-75 sample covered cases decided during the 6-month period between October 15, 1974 and April 15, 1975. The latter date was selected as the cutoff date in order to just antedate the Supreme Court's decision on April 16, 1975 in Natural Resources Defense Council v. Train, 421 U.S. 60 (1975), a case which anticipated Chevron in mandating deference to agency constructions of statutes.

26. The 1984 sample (both nonremand and remand cases) covered cases decided during the 6-month period between December 25, 1983 and June 25, 1984, the day Chevron was decided.

27. The 1985 sample (both nonremand and remand cases) covered cases decided during the 6-month period between February 28, 1985 (the day after Chemical Manufacturers was decided) and August 31, 1985.

28. The 1988 sample covered cases decided during the 2-month period between March 1, 1988 and April 30, 1988.

29. These data had been recorded by the researchers on individual coding sheets, one for each case. The final coding sheet, which is reproduced as Appendix B (available from the Administrative Conference), differs from several earlier versions, but only slightly. The changes were made in order to (1) add some items of information that could be adduced entirely from analysis of the published opinions (e.g., item AA relating to the standard of review), (2) refine some of the data categories (e.g., item K relating to the number of judges; item N relating to the result code), (3) correct obvious errors; and (4) permit computer programming. A coding key was also prepared to facilitate the uniform coding of the data.

30. The number of agencies was smaller during the two earlier periods covered by the study, partly because fewer appellate cases were decided during those periods and partly because there were then fewer agencies. Because of the temporal parameters of our dataset, some relatively low-volume agencies (e.g., the Consumer Product Safety Commission) do not have any cases in the dataset.

31. Three sources of agency cases--the Merit Systems Protection Board, the National Labor Relations Board, and the Immigration and Naturalization Service (sometimes through the Board of Immigration Appeals)--together accounted for approximately 57% of the cases decided during the 1984-85 study period. Before the creation of the MSPB, the NLRB generated the most cases, accounting for 31.7% of the total in 1965 and 41.5% in 1975.

32. We formed these groups and assigned particular agencies to them on the basis of a combination of analytical criteria and the frequency with which certain agencies appeared in our data set. The groups are: (1) the National Labor Relations Board; (2) health, safety and environment regulatory agencies; (3) other regulatory agencies; (4) the Immigration and Naturalization Service and the Board of Immigration Appeals; (5) the Merit Systems Protection Board, which accounted for by far the largest number of cases (27.5% in the 1984-85 period); (6) the Department of Labor; (7) executive departments other than the Department of

Labor; (8) the Patent Office; and (9) all other agencies. The agencies included in each group are listed in Appendix A (Available on request from the Administrative Conference). These designations are arbitrary in the sense that they represent only one of many ways in which the caseload could have been sliced. The labels used for some of these groups are also crude. Thus, for example, the Federal Mine Safety and Health Review Commission and the Occupational Safety and Health Review Commission, which are included in group (2), are not really regulatory agencies. And although the Federal Aviation Administration and the Occupational Safety and Health Administration certainly fit well in this group, we coded them instead to the departments of Transportation and Labor, respectively.

33. We took a number of precautions to satisfy ourselves that the students' analyses of the published opinions and their coding of the data were reasonably accurate and uniform.

There was little risk of error with respect to most of the data collected from the published opinions, which data were objective and straightforward in nature. Only two pieces of data in the opinions could not be coded without some exercise of judgment: the type of agency proceeding (item M on the coding sheet) and--a more difficult characterization--the reasons for remands (item N).

In order to achieve a high level of uniformity in characterizing the type of agency proceeding, we reviewed with the students the differences between adjudication, rulemaking, and ratemaking, and discussed the kinds of agency actions that might fall into the "other" category. We then instructed each of the students to read a random sample of cases, classify the type of agency proceeding involved in each, and bring any disputed classifications to us, whereupon we met as a group and resolved the few disputes in a way that further clarified the categories for the students.

Characterizing the reasons for remands was (because the courts' published opinions were not always entirely clear on the point) more difficult and we therefore felt obliged to be even more circumspect. First, we instructed all students to read a classic article by the late Judge Henry Friendly, which had elaborated the taxonomy of remands that we had found useful and wished to employ in the study. We then discussed that taxonomy as a group at some length. Friendly, "Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders," 1969 DUKE L. J. 199. Before permitting the students to read any of the cases to be covered by the study, we asked each of them to read and to complete coding sheets for an identical random sample of cases and then to meet among themselves to discuss any instances in which some or all of them had classified the reasons for a particular remand differently. After that, we met as a group to discuss those differences as well as any uncertainties that remained. We also encouraged the students to raise with us any questions that might arise when they analyzed the cases covered by the study, and we resolved those questions in weekly meetings that both of us and all of the students (with occasional exceptions) attended. After the students had completed all of the case analyses and coding sheets, we asked a lawyer with extensive administrative law experience in a federal agency to review for accuracy each of the cases and the students' coding sheets, making changes where appropriate. In addition, the authors reviewed each of the cases and coding sheets as to which that lawyer had raised any question, and we made the appropriate changes.

The authors adopted two additional reliability checks that should be standard procedure for studies of this kind. First, we each read several volumes of the Federal Reporter and checked our codings of the cases against those that the research assistants had compiled, going over any discrepancies with them in order to resolve any apparent misapprehensions. Second, we generated a list of key words and phrases that could be the basis for a computerized search for the cases that should be in our data sets. We then tested the reliability of this search technique by comparing its outputs to the cases contained in the relevant volumes of the Federal Reporter, enabling us to refine further the list of key words and phrases. Because this technique holds much promise for future research of this kind, we describe it in some detail in Appendix C. (Available on request from the Administrative Conference.)

Coding the data generated by the telephone interviews usually required only that the students accurately transcribe what the lawyers told them, rather than that they exercise independent judgment. The opposing lawyers seldom told them inconsistent things and when they did, the students simply recorded those differences on the coding sheet.

Given the large number of cases in the data set and the limited experience of the students, we suspect that even these precautions failed to detect some errors. Nevertheless, we believe that the number of such errors cannot be large enough to affect the general conclusions that we have reached from our analysis.

34. To cite just one example, Professor Linda Hirshman notes that the fact that NLRB orders have no effect until they are enforced by the circuit court "creates a culture among labor lawyers of considering all NLRB orders as very tentative, [which] would have a big effect on the statistics throughout [this study]. They should be resisted much more often and reversed. . . more often." Letter to E. Donald Elliott, January 18, 1990.

35. The District of Columbia Circuit and the Federal Circuit are striking exceptions to these generalizations: administrative law appeals continue to comprise a significant fraction of their caseloads, thus permitting their members to acquire and maintain administrative law expertise. See discussion infra at pages 48-49.

36. See, e.g., Robinson, The D.C. Circuit: An Era of Change, 55 GEO. WASH. L. REV. 715, 716 (one-fourth of all federal agency reviews reach D.C. Circuit, far more than in any other circuit); The Contribution of the D.C. Circuit to Administrative Law, 40 ADM. L. REV. 507 (1988) (importance of caseload). This view is buttressed by statutory provisions locating venue for certain types of important disputes in the District of Columbia Circuit. E.g., 42 U.S.C. Section 7607(b)(1) (challenges to nationally applicable Clean Air Act regulations).

37. The notable exceptions are Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. CHI. L. REV. 573 (1981); Comment, Unreported Decisions in the U.S. Courts of Appeals, 63 CORN. L. REV. 129 (1977). See also, Judge Wald's separate statement in National Classification Comm. v. United States, 765 F.2d 164, 172-75 (D.C. Cir. 1985); Ginsburg, The Obligation to Reason Why, 37 U. FLA. L. REV.205, 218-23 (1985); Stienstra, Unpublished Decisions: Problems of Access and Use in the Court of Appeals (Fed. Judicial Center, 1985).

There has also been criticism of rules in some circuits that permit a party to request publication of an opinion. Reynolds & Richman, NonPrecedential

Precedent, 78 COL. L. REV. 1167, 1179 n.72 (1978). There has been somewhat more commentary on the impact of publication rules in particular circuits. See, Comment, A Snake in the Path of the Law: The 9th Circuit's NonPublication Rule, 39 U. PITT. L. REV. 309 (1977); Reynolds & Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 DUKE L. J. 807.

For commentary on the impact of limited publication in state courts of appeal, see Newbern & Wilson, Rule 21: Unprecedent and the Disappearing Court, 32 ARK. L.REV. 37 (1978); Render, On Unpublished Opinions, 73 KY. L. J. 145 (1984-85); Andreani, Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System, 12 PAC. L. J. 727 (1981).

38. In the D.C. Circuit, at least, unpublished opinions have no precedential effect except upon the parties to that litigation. See, Mobil Oil Corp. v. EPA, 117 Daily Washington L. Rep. 1033 (1989).

39. Judicial Conference of the United States, [1964] Report 11, quoted in Reynolds & Richman, supra note 37, 48 U. CHI. L. REV. at 577.

40. 467 F.2d 943-44 (1972). In this connection, West's exercises no discretion but simply includes in the tables all decisions that are submitted to it by the circuits for publication.

In 1973, the Advisory Council for Appellate Justice of the Federal Judicial Center published "Standards for Publication of Judicial Opinions," which urged that unpublished opinions should contain the results and reasoning and explain the result to the appellate court in order to facilitate review. FJC Research Series No. 73-2.

41. Although this diversity was viewed as a source of useful experimentation, the Conference has not subsequently reexamined the issue. (1974) Judicial Conference of the U.S. Report 12-13.

42. It should be noted that the numbers and percentages of cases presented in Table l and in subsequent tables and in text may reflect some double counting, as when a case was coded both "affirmed in part" and "other." As the tables indicate, the frequency of such double counting was very low. For this reason, we are confident that such double counting did not significantly affect any of the findings that we report.

43. We have no doubt that superior indices could be used. The great virtue of ours, of course, is that they are so easily measured and coded. This is an example of the unfortunate but inevitable reality that methodological constraints often drive and shape the analysis.

44. See, e.g., Pierce, Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1988 DUKE L. J. 300 (1988); Wald, Rebel Angel in Flight, 10 DISTRICT LAWYER 30, 32 (July/August 1986). Judges Bork, Scalia, and Starr were the Reagan appointees during the period preceding our 1984-85 dataset. But see Edwards, Public Misperceptions Concerning the Politics of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. COLO. L. REV. 619 (1985).

45. The last, Starr, was appointed about three months before our 1984 case sample began, and the court's membership then remained unchanged until well after our 1985 sample ended.

46. For prior discussions of the issue of fragmentation and divisiveness in judicial opinions, see Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802 (1982); Easterbrook, Agreement Among the Justices: An Empirical Note, 1984 SUP. CT. REV. 389. In analyzing divisiveness, we counted the number of separate opinions, which has the advantage of being an objective measure, but gives the same weight to concurring and dissenting opinions. Although in some cases dissents may reflect a greater degree of division on the court than concurrences, we believe that the number of separate opinions is the best measure of divisiveness. The only other possible measure of divisiveness that our data could exploit is the number of footnotes in the court's opinion(s). Because the relationship between the number of footnotes and the degree of divisiveness is weak, ambiguous, and speculative, however, we simply mention it briefly here.

47. Since table decisions invariably involve only one opinion, courts' use of them operates to reduce the average number of opinions per case. This could produce distortion if for reasons having nothing to do with divisiveness their use increased over time or if different circuits use them in different proportions. In fact, different circuits do use table cases in different proportions, and those proportions have changed over time. In 1975, when 28.5% of the cases were table decisions, the major users of table decisions were the 1st (75%) and 4th (64%), with four other circuits clustering around 20%. In 1984-85, when the proportion more than doubled to about 59%, the frequency of use among the circuits produced a very different pattern.

48. As we have just seen, court size does not always correlate with longer opinions and more footnotes. These findings are surprising, at least if one assumes that cases that courts schedule to hear *en banc* tend to be more divisive (a proposition that we believe but on which we have no data) or more important and that more divisive and important cases produce longer and more heavily footnoted decisions (a proposition that we substantiate immediately below with respect to divisiveness).

49. In 1984-85, *en banc* courts wrote twice as many opinions per case as 3-judge panels, a much higher ratio than in the previous time periods.

50. Perhaps more interesting--but limited by the small number of 3-opinion cases in the samples--is the observation that the footnoting seems to increase geometrically as divisiveness grows from two to three opinions per case. In 1984-85, for example, one-opinion nontable cases (593) averaged 6 footnotes, 2-opinion cases (86) averaged a total (for both opinions) of 10 footnotes, and 3-opinion cases (only 9) averaged a total of 41 footnotes.

51. The argument would be that a court's use of the table decision device, while largely signalling collegial consensus, might in some cases be used purely as a way to enable an overburdened court to deal with caseload pressures. In those cases, so the argument would run, the unanimity of the table decision really reflects an exigent, artificial consensus, not a real one.

52. The lion's share of this decline in the D.C. Circuit's share of the national total between 1974 and 1984-85 was picked up by the Federal Circuit. In 1981 the Federal Circuit not only acquired the jurisdictions of the Court of Customs and Patent Appeals and the Court of Claims, but also became the exclusive venue for all patent appeals. In 1975 the shares of its two predecessor courts were only about 5%.

53. See Pierce, supra note 44.

54. The D.C. Circuit, however, was not the only court below the national average. During each period, there was at least one other circuit whose consensus level was either lower than or approximately the same as the D.C. Circuit's. In 1965, it was the First Circuit and the Court of Customs and Patent Appeals; in 1975, the Seventh and Eighth Circuits; and in 1984-85, the Third and Eighth Circuits.

55. Judges Silberman, Buckley, Williams, Douglas Ginsburg, and Sentelle joined the court between 1985 and 1987. Senior Judges McGowan and Bazelon, both Democratic appointees, and Senior Judges Robb and Wilkey, Republican appointees, left the court after 1985.

56. See Elliott, The Dis-Integration of Administrative Law: A Comment on Shapiro, 92 YALE L. J. 1523, 1530-1531 (1983) ("As an historical matter, the high-water mark of judicial control of administrative action was reached about a decade ago . . . [in] the middle 1970's . . . .").

57. See, e.g., S. Breyer & R. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY (2nd ed. 1985) at 35-36 and ("Basic public trust in the administrative process and the spirit of working partnership between agency and reviewing courts that had developed in the postwar period began to disintegrate after 1965. The work of administrative agencies came under increasingly sharp attack on several fronts, and courts began to impose more stringent and far-reaching controls on the administrative process.") See also Stewart, supra note 16.

58. Professor Pierce, it should be noted, relies on the AO data for his assertions about the D.C. Circuit's propensity to reverse and remand agency actions. Supra note 44.

59. See 5 U.S.C. 553(a).

60. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

61. See, e.g., Priest & Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1983).

62. The Priest-Klein theory is not inconsistent with this observation, for it recognizes that "repeat players" (of which agencies are classic examples) will face different incentives to litigate than adversaries whose play is not as repetitive. Id. at 24-29. See also Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC. REV. 95 (1974). An administrative agency, which develops policies and procedures that must be applied in countless situations, is a classic example of the repeat player.

63. 8 U.S.C. Sec. 1105 a(a)(3) See Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 76-77, esp. n. 432 (1984).

64. See discussion infra Part II, Section 4(b)("Post-Remand Outcomes").

65. There is some empirical evidence that lawyers are poor predictors of the outcomes of their cases, tending to be over-confident concerning their chances of winning. See, Loftus & Wagenaar, Lawyers' Predictions of Success, 28 JURIMETRICS J. 437 (1988).

66. During each period, there were also a small number of nontable decisions that were coded as "other."

67. Many of them, for example, are NLRB cases.

68. See, e.g., Schuck, When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through An Exceptions Process, 1984 DUKE L. J. 163, 194-96. For an extended exploration of this theme in the context of National Highway Traffic Safety Administration rulemaking, see Mashaw and Harfst, supra note __.

69. The Patent and Trademark Office experienced a sharp decline between 1965 and 1985 not only in its share of the administrative law caseload in the circuit courts, but also in the absolute number of its cases being reviewed there-from 111 in the 6-month period in 1965 to 56 in the corresponding period in 1985. See discussion infra. In contrast, the absolute number of NLRB cases during the two periods remained the same (118).

70. Until the 1978 Civil Service Reform Act created the MSPB, appeals from Civil Service Commission personnel actions went to the district courts. Accordingly, they were not included in our data set.

71. See, e.g., Federal Regulation and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce (Oct., 1976).

72. See Lilley & Miller, The New "Social Regulation," 47 THE PUBLIC INTEREST 49 (1977).

73. Concerned that this decline might possibly have been caused by careless data collection for the 1965 and 1975 periods, we constructed a WESTLAW search designed to identify cases fitting our criteria for inclusion. The search technique is explained in Appendix C (available from the Administrative Conference on request). We then compared the cases so generated against those already in our database. The fit was pretty close, but not perfect; in any event, the number of discrepancies was not nearly large enough to have caused the caseload decline. After the search, we again read the discrepant cases and added to our database those which the earlier data collectors had missed.

In the end, about 90 percent of the 1965-1975 caseload decline was caused by a decrease in the number of patent and trademark cases coming into the appellate courts during that period.

74. The data also reveal fluctuations of this kind in certain other circuits. For example, the First Circuit's caseload share changes from 3.8% to 5.8% to 1.4% over the three periods.

75. Supra note 36.

76. The Federal Circuit also heard appeals from the MSPB, certain international trade decisions, and the Tax Court.

77. The share of cases decided by panels of four or more judges but less than *en banc* has always been small; it was under 6% in 1965 and was under 2% in 1985.

78. *En banc* decisions are apparently even rarer in nonadministrative law cases and are declining there as well, at least as a percentage of the total caseload. See Solimine, Ideology and *En Banc* Review, 67 N.C.L. Rev.29,46 (1988) (en banc decisions as percentage of entire caseload declined from 0.61% in 1980 to 0.47% in 1987).

79. The particular effects of Chevron on remands are considered in the next section.

80. Examples of dispositions which we coded as "other" include decisions dismissing for lack of jurisdiction or for lack of a final order subject to review, decisions on an application for attorneys fees, decisions on a motion to add another agency as a party, decisions granting rehearing, and the like.

81. One theory would stress the importance of judicial ideology. Since the D.C. Circuit was widely regarded as perhaps the most "liberal" or "activist" circuit, at least during the 1965 and 1975 periods covered by the study, one might expect that court to use judicial review as a way to frustrate the process of agency "capture" that was prominent during those periods and that occasionally surfaced in opinions of that court. Another theory--call it the "familiarity breeds contempt" idea--would stress that the volume of agency cases coming before the D.C. Circuit was so great that the court would be less awed by claims of agency expertise than other courts without much experience of it.

82. To recur to the examples used: as an "old-line" agency with a fully-elaborated administrative law, the NLRB might receive greater judicial deference than relatively new agencies, whose credentials were not so well-established. As for the D.C. Circuit, its liberal orientation might cause it to sympathize with activist, pro-regulation agencies, while its administrative law experience might encourage respect for technical claims rather than skepticism.

83. Compare Shapiro, Administrative Discretion: The Next Stage, 97 YALE L. J. 1487, 1500-1511 (1983)(typology of various types of discretionary decisions by agencies, including "high-volume, low-level decisions" and broad policy decisions under "thematic statutes").

84. We did code the cases in our datasets for the standard of review. Because the courts often failed to state explicitly what particular standard they were applying, however, we have less confidence in the accuracy of these codings and we have not reported those results here.

85. E.g., Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. REG. 283 (1986) (referring to Chevron as "watershed decision")

86. The test involves two steps. First, the reviewing court is to determine whether there exists specific Congressional intent on the issue in question. If the court discerns such intent, either express or implied, agency interpretations to the contrary are to be overruled. Second, if there is no such specific Congressional intent, the court assesses whether the agency's interpretation is based on a permissible construction of the statute. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." The test is spelled out completely in Chevron, 467 U.S. at 842-44. See Starr, supra note 85.

87. NLRB v. Hearst Publications, 322 U.S. 111 (1944); Udall v. Tallman, 380 U.S. 1, 4 (1964).

88. United States v. Swank, 451 U.S. 571 (1981); Morton v. Ruiz, 415 U.S. 199 (1974).

89. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976)(Friendly, J.)("[T]here are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."); 5 K.

DAVIS, ADMINISTRATIVE LAW TREATISE Sec. 29:07 (1978); Gellhorn & Robinson, Perspectives on Administrative Law, 75 COLUM. L. REV. 771, 780-81 (1975).

90. 436 U.S. 103 (1978).

91. 15 U.S.C. 78(k) (1976 ed.).

92. 436 U.S. at 118.

93. 436 U.S. at 118 (quoting from Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

94. 436 U.S. at 113.

95. Chevron v. NRDC, 467 U.S. 837, 844 (1984).

96. For an excellent summary of Chevron and the lines of authority that preceded it, see Starr, supra note 85.

97. Chevron v. NRDC, 467 U.S. 837, 842-843 (1984) (emphases supplied; footnotes omitted).

98. See, e.g., discussion in Hirshman, Postmodern Jurisprudence and the Problem of Administrative Discretion, 82 NORTHWESTERN L. REV. 646 (1988).

99. 470 U.S. 116 (1985).

100. E.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (holding Corps of Engineers' extension of regulatory authority as reasonable under statutory authority); Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986) (affirming Chevron but finding FRB's regulation defining "banks" as outside statutory authority); United States v. City of Fulton, 475 U.S. 657 (1986) (Secretary of Energy not prohibited by Flood Control Act from establishing interim hydroelectric power rates).

101. 470 U.S. at 129.

102. Starr, supra note 85 at 295.

103. See, e.g., J. Frank, LAW AND THE MODERN MIND (19__).

104. E.g., Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985). Congress' hostility to limits on judicial review is suggested by the Veterans' Judicial Review Act--Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

105. See, P. Schuck, supra note 1, at chaps. 1, 6, and 7 and studies there cited.

106. See Scalia, Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345 (D.C. Circuit's response to Vermont Yankee); T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS AND POLICY 516-27 (1985) (Ninth Circuit's response to INS v. Wang, 450 U.S. 139 (1981)). In both cases the Supreme Court spoke to the reviewing courts with unusual vehemence and clarity.

107. See, e.g., Sunstein, Deregulation and the Courts, 5 J. Poly. Analysis & Mgt. 517 (1986); Breyer, Judicial Review of Questions of Law and Policy, 38 ADM. L. REV. 363 (1986); Anthony, Which Agency Interpretations Should Bind the Courts?, Report to the Administrative Conference of the United States, November 7, 1988 draft.

108. See, e.g., INS v. Cardoza-Fonseca, 767 F.2d 1448 (9th Cir. 1985), aff'd 480 U.S. 421 (1987).

109. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L. J. 1, 19-20 (1984); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 819 (1983).

110. Singer, id., at 10.

111. Our own version of the law skepticism claim is generally weaker, although as applied to administrative law it led us to essentially the same prediction about the effect of Chevron. See supra at 23.

112. The so-called Chenery doctrine in administrative law holds that courts should normally remand for reconsideration by the agency those decisions that are based on errors of law rather than reverse the agency outright. The remand permits the agency to consider whether as a discretionary matter the agency wishes to alter its result or supply an alternative rationale for it. See generally, Friendly, supra note 33; Weaver, Chenery II: A Forty Year Retrospective, 40 ADM. L. REV. 161 (1988).

113. An individual case, of course, might be assigned to more than one category.

114. K. Llewellyn, THE BRAMBLE BUSH (1951) (concerning the "law of leeways").

115. See infra--to --.

116. See, e.g., Mashaw, Pro-Delegation: Why Administrators Should Make Political Decisions, 1 J.L.E.O. 81 (1985).

117. C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS: NATURE AND DEVELOPMENT 16-18 (1937).

118. See generally Hirshman, Postmodern Jurisprudence and the Problem of Administrative Discretion, 82 NORTHWESTERN L. REV. 646, 688-703 (1988) (discussing post-Chevron caselaw as appearing to pull back from "revolutioniz[ing] the relationship between courts and agencies").

119. 107 S.Ct. 1207 (1987). See also NLRB v. United Food and Commercial Workers Union, 108 S.Ct. 413 (1987).

120. INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1224, 1225 (Scalia, J., concurring in the result).

121. 107 S.Ct. at 1220. (quoting Chevron).

122. Id. at 1220.

123. See discussion of the "remands displacement effect," supra pages 70-74.

124. See discussion supra, text at notes--to--and Chart --.

125. As we pointed out supra note __, some doublecounting was inevitable under our coding system since a case that was reversed in part and either affirmed in part or remanded in part was coded as both a reversal and as something else.

126. Again, two groupings seemed to controvert the Chevron effect, although both changes were very small. The immigration cases increased their failure rates from 4% to 5%, and the MSPB increased its rate from 2.9% to 3.1%.

127. See, e.g., J. Noonan, PERSONS AND MASKS OF THE LAW (1976); A. Lewis, GIDEON'S TRUMPET (1964); P. Schuck, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed., 1987).

128. This bias could not be entirely overcome (and may even have been compounded in some cases) by our technique of asking the lawyers on both sides--"agency" and "petitioner"--the identical questions about each of the remanded cases. (Our convention was to label the party opposing the agency as "petitioner" even when it was the agency that had petitioned for review of the decision below.)

This technique, however, did reveal persistent discrepancies between the responses of the agency's lawyers and those of the petitioner's lawyers. The discrepancies occurred not only as to questions to which we expected the parties to respond differently (e.g., "Which of the following . . . best describes the practical effect on your client . . .") but also as to those to which we expected their responses to be identical (e.g., procedures after remand; elapsed time). Because these discrepancies generally were quite small (on the order of 5 percentage points or less), we ascribe no particular significance to them, but they do present a problem in reporting and analyzing the data. We have chosen to average the petitioner and agency lawyers' responses on the theory (lacking any better one) that the truth lies somewhere in between. Where particular discrepancies might be of substantive significance, we note them.

Finally, the crudeness of these data have caused us to often use terms like "roughly" or "about" rather than numerical percentages, which should alert readers to the analysis' imprecision on these points.

129. For example, a remand that resolved points of substantive or procedural law or that signalled the court's view of the merits would reduce the parties' uncertainty as to the ultimate outcome, while a remand that demanded more agency fact-finding or justification would increase the cost to the agency of continuing to maintain its earlier position.

130. Our data on post-remand outcomes, discussed in the next subsection, distinguish between agencies that "agreed to settlement" and agencies that "dropped the proceeding." Unfortunately, the total for these two categories does not equal the total for "no further proceedings after remand." We are uncertain about the sources of this discrepancy. One may be that cases in which the nonagency party dropped the proceeding were coded as "other." Another may be that "no further proceedings after remand" was applied so literally as to exclude cases that the agency dropped only after some proceedings had occurred.

131. It was necessary to combine all of the other circuits in order to obtain sufficiently large numbers to make the comparison meaningful.

132. See, e.g., Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).

133. The classic example, of course, is the Morgan litigation before the Supreme Court. Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1930); United States v. Morgan, 307 U.S. 183 (1939); United States v. Morgan, 313 U.S. 409 (1941).

134. Our colleague Harlon Dalton has analyzed the struggle between appellate and trial courts in much the same terms, expressing skepticism about the extent of trial court self-correction resulting from appellate review. Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 YALE L. J. 62, 90-93 (1985). For the reasons stated in text, we believed that such skepticism would be even more warranted in the case of appellate review of agency action.

136. They relied upon "old facts" in about one-third of the preChevron remands and 54% of the post-Chevron ones, a change for which we have no explanation. In contrast, they relied upon "new facts" in only about 20% of the preChevron remands and about 17% of those after Chevron.

137. We would especially like to know when they make major changes simply on the basis of the old record, but at that level of data disaggregation our data set is too small to present meaningful findings.

138. The health, safety, and environmental agency cluster made a major change in about 10% of its remands before Chevron and one-sixth of them after Chevron; for the INS, the corresponding percentages were 17% and zero, respectively. The number of remands to these agencies, however, was relatively small. In contrast, some agency clusters experiencing more frequent remands made "major changes" in 25% or more of the cases.

139. The 40% figure refers to the preChevron period. It was even higher in the post-Chevron period: 41% according to the agency lawyers and 52% according to their opponents.

140. That convergence, however, lessened after Chevron. Id.

141. The actual percentages were 39% preChevron and 44% post-Chevron. We are not sure what to make of the fact that the percentage of the agency lawyers who responded "less favorable to client" was far lower (2% before Chevron, 9% after) than the percentage of their opponents who responded "much more favorable to client." We must concede that the response choices could have been more artfully phrased; for example "less favorable" is not quite the obverse of "much more favorable." Other possibilities are that agency lawyers manage to find silver linings even in defeat or that nonagency lawyers are more prone to exaggerate their litigation success than are their opponents.

142. [supra cite]

143. For some cases, neither lawyer provided duration information. For cases in which one of the lawyers provided it and the other did not, we used the information provided. For those in which both lawyers provided duration information but their numbers differed, we averaged them for purposes of this analysis.

144. These duration figures are quite conservative for two reasons. First, the data sets included 18 cases that were still pending when the lawyer interviews were conducted. In our duration analysis, we assumed that the still pending cases from the 1984 data set were completed in 57 months and that the ones from the 1985 data set were completed in 42 months. In fact, of course, these cases had not been "completed" at that point; for all we know, they may still be pending. Second, we measured elapsed time only from the date of remand. The duration of an administrative proceeding as a whole was of course much longer, for it also must include (1) the time consumed between the initiation of the proceeding and the date of the remand, and (2) the time consumed by any post-remand judicial review. Third, we measured elapsed time from the end of each of the data-sets.

145. This figure refers to the 1984 remands. More than one in five (13 out of 60) of the 1985 remands was still pending 3-1/2 years after the remand.

146. For the 1984 remands, rulemakings took more than 13 months, or 2-3 months longer than adjudications on average. For the 1985 remands, however,

rulemakings averaged only about 7 months, which was actually 10 months less than the average adjudication. We are unable to account for these disparities.

147. There are some limits on the right of agencies to take some of these factors into account, especially in adjudications. See, e.g., D.C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972) (setting aside agency approval of bridge because of political threats by member of Congress who supported bridge). See also Motor Vehicle Manu. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (rule change must be not arbitrary and supported by record).

148. In thinking about the consequences of delay, it is well to distinguish three time-related factors that may affect outcomes: (1) the remand itself, because of how the reviewing court's words or implications may alter the parties' expectations for success; (2) the prospect of further proceedings, because of the additional transaction costs they may entail; and (3) the influence of events that intervene between the agency's original decision and its final decision after the remand. The first two are discussed above. Here, we are concerned only with the third.

149. The two, of course, are often connected.

150. Several recent articles for lawyers describe basic epidemiological principles and methods. E.g., Gordis, Epidemiologic Approaches for Studying Human Diseases in Relation to Hazardous Waste Disposal Sites, 25 HOUSTON L. REV. 837 (1988); Black & Lilienfeld, Epidemiologic Proof in Toxic Tort Litigation, 52 FORDHAM L. REV. 732 (1984).

151. See, e.g., Priest & Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1983); Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983); Wheeler et al., Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970, 21 Law & Soc. Rev. 403 (1987).

152. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 476-77 (1897).

153. Priest, Selective Characteristics of Litigation, 9 J. LEGAL STUD. 399 (1980).

154. Cf. Elliott, Holmes and Evolution: Legal Process as Artificial Intelligence, 13 J. LEGAL STUD. 113, 142 (1984). ("Acting alone, no judge makes law; law is a function of legal systems, in which judges communicate and are influenced by one another. The interesting issue is not why an individual judge decides as he does, but why others follow.")

155. Some of the comparisons that we thought would prove interesting did not bear fruit--either because our database was too small to permit multiple comparisons (e.g., NLRB cases decided by the 1st Circuit vs. NLRB cases decided by the 2nd Circuit), or because the factors that we isolated for study turned out not to have as much predictive power as we imagined before we did the study. Thus, for example, our hypothesis that the legal grounds on which courts remanded cases to agencies might be a powerful factor influencing the agency's ultimate decision after remand turned out to have been incorrect: we did not observe significant differences between the final results reached when, for example, courts remand on a procedural ground than when they remand for further explanation.

example, courts remand on a procedural ground than when they remand for further explanation.

156. See, e.g., Melnick, supra note 1 (Environmental Protection Agency); J. Mashaw, BUREAUCRATIC JUSTICE (1983) (Social Security Administration); J. Mashaw & D. Harfst, REGULATING THE FREEDOM MACHINE (forthcoming, 1990) (National Highway Traffic Safety Administration). See also, D. Rosenbloom, THE FEDERAL LABOR RELATIONS AUTHORITY, unpub. ms., 1988. Peter Schuck and Theodore Wang, drawing upon the data and methodology of this study, are undertaking a collaborative study of the relationship between a particular agency--the Immigration and Naturalization Service--and the reviewing courts.

157. The data compiled by the Administrative Office of the United States Courts is useful but is only a starting point for analysis. The report to the Administrative Conference of the United States, on which this article is based, includes specific recommendations along these lines. [cite] An earlier recommendation by the Administrative Conference also looked in this direction. ACUS Recommendation No. 69-6, "Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies," 1 CFR Section 305.69-6 (1988).

158. See Tables 3 and 4, supra page 64.

159. The process of reviewing thousands of cases to identify those which fit the researcher's criteria can be both economically and psychologically costly, problems perhaps worse than those encountered in the social sciences, where many standardized data classifications and categorizations already exist and where experimental techniques are more prevalent. Electronic legal research potentially offers legal academics similar benefits--tremendous collections of data, broken down into categories and subdivisions. Of course, the existing categories and subdivisions will not be appropriate for all empirical research needs. But the flexibility available in tailoring an electronic search to a researcher's needs means that a scholar's research potential is not limited to the conceptualizations of the computerized databases' authors.

160. The district court screen may seem crude but is actually highly accurate. The syllabus of every case that is an appeal from a district court contains the phrase ." . . appeal from the district court of ______," and the word "district" is used very rarely for other purposes. While checking the results of the search against our database, we discovered a few cases in our database that WESTLAW eliminated by virtue of the search procedure's elimination of cases based on other constructions of "district" (e.g., "water district"), but the number was very small. If we were to run another search with the same goal of eliminating appeals from district courts, we would screen by "district court" instead of by "district" only.

161. For analytical purposes, it is important to do so because we coded each table decision as being one page in length. In addition, of course, they contain no footnotes and no separate opinions. As table decisions become a more significant part of the study sample, therefore, they increasingly distort the data on those variables.

162. See also, Eisenberg and Schwab, What Shapes Perceptions of the Federal Court Systems? 56 U. CHI. L. REV 501, 505-06 (citing Posner, The Federal Courts: Crisis and Reform, for proposition that the D.C. Circuit's opinions are twice as long, and contain six times as many footnotes, as other circuits). The

affected by one or a few long opinions, as reflected by a large standard deviation (10.3).

163. The opinions in the Federal Circuit, which did not exist in 1975 but which accounted for 17% of the cases in our 1985 dataset (only the D.C. Circuit, with over 21%, accounted for more), were among the shortest, averaging 5.6 pages.

164. We had of course expected our data to confirm the post-1965 move by many agencies from an almost exclusive preoccupation with adjudication to a greater use of rulemaking, a development that had received much commentary in the administrative law literature. [cites to articles, Ash Commission report, etc.] Still, the magnitude and swiftness of that sea change surprised even us. While more than 92% of the cases in our 1965 sample were adjudications and less than 2% were rulemakings or ratemakings, the proportion of adjudications only 10 years later had declined to just over 50% and the rulemakings and ratemakings accounted for almost 10%. By 1984-85, adjudications constituted only 33%, but by this time (unlike in 1975) the data on agency proceeding type were confounded by the large number of table cases in the sample, thus significantly reducing the percentage of the total that were adjudications.

165. The reason is that the number of rulemakings (and to a lesser extent, ratemakings) was too low in 1965 to support any conclusions, while in 1984-85 the number of table decisions was so large as to distort the data on average opinion length.

166. Rulemakings and ratemakings averaged 24.4 and 37 footnotes, respectively, while adjudications averaged 11.8.

167. [supra cite]

168. Our colleague, Professor Ruth Wedgwood, had the opposite expectation. She believed that law-based remands would use fewer footnotes because as a matter of form and convenience, legal authorities can be, and often are, cited in text.

169. During the most recent period (1984-85), law-based remands had opinion lengths averaging 7 (for procedurebased ones) and 8 (for substantive-based ones), compared to an average of 10 and 11 pages for fact- and rationale-based ones. Law-based remands averaged 6 and 8 footnotes respectively, compared to 11 footnotes for fact- and rationale-based ones.

170. See, e.g., Lilley & Miller, The New 'Social Regulation,' 1977 PUB. INTEREST 49 (Spring); THE POLITICS OF REGULATION (J.Q. Wilson, ed. 1980); Schuck, The Politics of Regulation, 90 YALE L. J. 702, 708-11 (1981) (review of Wilson book).

171. See Table S-1, "U.S. Courts of Appeals; Appeals Filed by Circuit Involving Administrative Agency Decisions During the Twelve Month Period Ending June 30, 1987," Annual Report of the Director of the Administrative Office of the U.S. Courts, vol. 1987.

172. Note that our 1985 data covers the period from February 25, 1985 to September 30, 1985, and thereby extends 2 months into the Administrative Office's 1986 data year.

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